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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDICES TO JURISDICTIONAL STATEMENT

JOHN PAYTON *
MARK S. HERSH
PETER L. KAHN
WILMER, CUTLER & PICKERING
2445 "M" Street, N.W.
Washington, D.C. 20037
(202) 663-6000

DREW ST. J. CARNEAL
City Attorney

MICHAEL L. SARAHAN
Assistant City Attorney

MICHAEL K. JACKSON
Assistant City Attorney
Room 300, City Hall
900 E. Broad Street
Richmond, Virginia 23219
(804) 780-7940

Counsel for Appellant

* Counsel of Record

EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1002(L)

J. A. Croson Company, Appellant,

versus

City of Richmond, Appellee.

Associated General Contractors of America,
Americus Curiae.

No. 85-1041

J. A. Croson Company, Appellee,

versus

City of Richmond, Appellant.

Associated General Contractors of America,
Americus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr. District Judge. (CA 84-0021-R).

Argued: July 17, 1985
Decided: November 25, 1985

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

Walter H. Ryland (Williams, Mullen & Christian on brief) for Appellant/Cross-Appellee; Reginald M. Barley, Senior Assistant City Attorney; (Michael L. Sarahan, Assistant City Attorney on brief) for Appellee/Cross-Appellant; (Michael E. Kennedy for Amicus Curiae).

SPROUSE, Circuit Judge:

In its action in the district court for an injunction, declaratory relief and damages, J.A. Croson Company (Croson), challenged the Minority Business Utilization Plan of the City of Richmond.[1] The court ruled in favor of the City declaring the Plan valid and Croson brought this appeal.[2] The City of Richmond appeals the district court's

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[1]The action was originally filed in the Circuit Court of the City of Richmond. It was removed to the federal district court pursuant to 28 U.S.C. § 1441 (a) (1982). The district court assumed original jurisdiction over Croson's federal constitutional claims pursuant to 28 U.S.C. § 1331 (1982) and over Croson's state law claims by pendent jurisdiction. After the district court denied Croson's motions for summary judgment, the case was submitted on depositions, stipulations of evidence, and limited testimony.

[2]In a companion case Mega Contractors, Inc. v. City of Richmond, CA 84-0022-R, the district court ruled for the city and Mega did not appeal.

denial of its motion for attorneys' fees. We affirm the district court's judgment in its entirety.

I.

The dispute arose from the application of Richmond's Minority Business Utilization Plan (the Plan) to Croson's bid on a proposed city contract to install plumbing fixtures at the City Jail. Croson, an Ohio mechanical, plumbing, and heating contractor with a Richmond branch, was the only bidder, but City officials refused to award it the contract since it did not obtain the services of a minority subcontractor as required by the Plan. After the City nullified Croson's bid and reopened the bidding, Croson filed this action for injunction, declaratory relief, and damages. It asked primarily that the Plan be declared void under Virginia statutory and constitutional law as well

as under the fourteenth amendment to the United States Constitution. The trial court denied cross-motions for summary judgment, and after a bench trial ruled that the Plan was valid.

II.

The Richmond Council adopted the Plan on April 11, 1983. Richmond Va. Code Ch. 24.1, Art.I(F) (Part B) (27.10) (27.20) and Art. VIII-A. It acted in response to information presented at a public hearing held that day which, among other things, indicated that, although minority groups made up 50% of the City's population, only 0.67% of the city's construction contracts for the five-year period from 1978-1983 were awarded to minority businesses. Simply stated, the Plan requires all contractors to whom the city awards construction contracts to subcontract at least 30% of the dollar amount of the contract to minority

business enterprises (MBEs) unless the requirement is waived. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A), (B).[3] The Plan is expressly remedial in nature and was "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). It automatically expires on June 30, 1988, approximately five years after its effective date. Id.

Five months after enacting the Plan, the City issued an invitation to bid on

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[3] The Plan defines an MBE as "[a] business at least fifty-one percent of which is owned and controlled or fifty-one percent minority-owned and operated by minority group members, or in case of a stock corporation, at least fifty-one percent of the stock which is owned and controlled by minority group members." Richmond, Va. Code Ch. 24.1, Art. I(F) (Part B) (27.10). "Minority group members" are defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code Ch. 24.1, Art. I(F) (Part B) (27.20).

the contract for the installation of plumbing fixtures at the City Jail involved in this dispute. The specifications defined fixtures manufactured by either Acorn Engineering Company or Bradley Manufacturing Company as suitable for the project. Croson, a non-MBE plumbing contractor, received the bid documents on September 30, 1983 and submitted its bid on October 12. After receiving the documents, Eugene Bonn, Croson's regional manager in Richmond, determined that the 30% MBE requirement on this project could only be met if an MBE was utilized as a supplier furnishing either the Acorn or Bradley plumbing fixtures.

Bonn telephoned either five or six MBEs on September 30 to obtain quotes on the fixtures.[4] There is a dispute as to the date Bonn first contacted Continental Metal Hose, the only one of these MBEs

located in Richmond. Bonn testified that he contacted Melvin Brown, the president of Continental, on September 30. Brown, however, claimed that he was not contacted until October 12, 1983--the last day on which bids could be submitted.

On the morning of October 12, Bonn made a second brief round of telephone calls to MBEs, including a call to Brown of Continental. Brown informed him that Continental wished to participate in the project. Brown then contacted two

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[4] The district court was unable to determine the exact number. (It was either 5 or 6). Telephone records submitted at trial, however, indicated that Bonn's September 30 long-distance telephone calls to all of these MBEs lasted a total of less than ten minutes. Officers of one of the MBEs testified they never received Bonn's call and it appears they were absent from the office. Representatives of two others testified that they were interested in bidding and asked Bonn to send them bid specifications in order to prepare price quotations for the fixtures, but that he never complied with this request.

sources of Bradley fixtures, Ferguson Plumbing Supply and W. G. Leseman. Ferguson informed Brown that the company had already provided a direct quote to Croson for the fixtures and consequently would not provide a quote to Brown. Leseman told Brown that it was not allowed to quote to unknown suppliers until the supplier had undergone a credit investigation taking at least thirty days.

On October 13, City officials opened the sealed bids, which revealed Croson as the only bidder. Its bid of $126,530 included a quote from a non-minority firm for the plumbing fixtures. That same day, Brown had detailed to Bonn his problems in obtaining a quote for the required fixtures, but Bonn encouraged him to continue his efforts. Although aware of Brown's continuing interest in supplying the fixtures, Bonn submitted a

request for waiver of the 30% MBE requirement to the City on October 19, 1983. In his waiver request, Bonn indicated that Continental was "unqualified" and that the other MBEs contacted were either "non-responsive" or "unable to quote."

On October 27, 1983, Brown learned of Croson's request for waiver and telephoned an agent of Acorn, one of the two fixture manufacturers named in the bid specifications. The agent provided Brown with a quote on October 31, which Brown supplied to Bonn shortly thereafter.

Brown also informed the Director of Purchasing for the Department of General Services on October 27 that Continental could provide the required fixtures. Subsequently, the contract officer responsible for ruling on Croson's waiver request recommended that the request be

disapproved because an MBE was available.

The City, by letter dated November 2, 1983, informed Croson that the Human Relations Commission had "withheld approval" of the waiver request. Croson was given ten days to submit a completed Commitment Form evidencing his compliance with the minority set-aside provision. He was advised that if he failed to submit the Form his bid would be considered non-responsive.

Rather than supplying a completed Commitment Form, Bonn again requested a waiver on November 8, 1983. He argued that Continental was not qualified; that its quotation was substantially higher than any other quotation and was submitted twenty-one days after the bid date. Eight days later, Bonn documented the additional costs that would result should Continental provide the fixtures. He concluded that, if he were required to

subcontract with Continental, the contract price must be increased by $7,663.16. The Department of General Services denied Croson's request to rais the contract price, as well as its renewed request for a waiver. On November 18, the City informed Croson by letter that it had decided to rebid the project and invited Croson to submit a new bid.

Three weeks later, Croson wrote to the Department of General Services requesting a review. The City rejected the request for review on the ground that the decision to rebid the project was not appealable.[5] Croson then filed this suit.

The district court in a well-written decision made comprehensive findings, reviewed both Virginia and Federal law and concluded that the Plan was valid. Croson does not pursue all of the

arguments it raised below, but on this appeal, as at trial, it argues that: (1) under state law the City was without power to adopt the Plan, (2) the Plan is contrary to the public policy of Virginia, (3) the Plan violates the Virginia constitutional proscription against discrimination on the basis of race, color, or national origin, Va. Const. Art. I, § 11, and (4) the Plan violates the equal protection clause of the fourteeneth amendment of the federal Constitution.

Affirmative action legislation creating minority set-aside plans and

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[5] Chapter 24.1, Article VII (C) of the Richmond Code provides that a disappointed bidder may appeal an award of a contract to another party. The appeal mechanism is sufficiently broad to permit appeal of a decision denying a contract to a losing bidder due to his failure to comply with the minority business utilization plan, but the appeal procedures are not available until after an award has been made. Here, because the city announced its decision to reopen the bidding process, no award was made.

designed to ameliorate the effects of past discrimination in public construction contracts have been tested and approved in a number of state and federal decisions. Fullilove v. Klutznick, 448 U.S. 448 (1980); South Florida Chapter of the Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir.) cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984); Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982); Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n. v. Pierce County, 667 P.2d 1082 (Wash. 1983); contra Arrington v. Associated Gen. Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied, 455 U.S. 913 (1982). Because set-asides may be

constitutionally permissible but are not constitutionally mandated, state and local programs must, of course, be permitted under state law. South Florida, 723 F.2d at 852; Schmidt, 662 F.2d at 558; Southwest Washington Chapter, 667 P.2d at 1100. We look first then to the issues of Virginia law raised by Croson both as they relate to pendent questions and as critical components of the test derived from Fullilove. We then examine the Richmond Plan under the Fullilove standards to determine if it survives scrutiny under the equal protection clause of the fourteenth amendment.

III.

Croson contends that the City of Richmond had no power to enact the plan--that it was ultra vires. It urges that the scope of a local government's authority in Virginia is determined by

Virginia's rule of law known as the "Dillon Rule," and that the contested ordinance is not within the purview of that rule. This principle of law is that "local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Tabler v. Bd. of Supervisors of Fairfax County, 221 Va. 200, 292, 269 S.E. 2d 358, 359 (1980). It is agreed that Virginia has not expressly authorized cities to adopt procurement set-aside programs for minorities. The validity of the ordinance, therefore, depends on whether it is authorized under one of the other two prongs of the Dillon Rule.

The Virginia Public Procurement Act, Va. Code §§ 11-35 to 11-80 (Supp. 1984), details complete procurement procedures for public bodies subject to its

requirements. The first section of this chapter--section 11-35 explains its purpose and applicability. Under this provision a city which adopts its own procurement policies is exempt from the state scheme provided the city's plan is based on competitive principles. Municipalities may devise local procurement programs when

> ... (the) governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof.

Va. Code § 11-35(D) (Supp. 1984).

The Richmond Business Minority Utilization Plan is not an isolated ordinance. The Council enacted the ordinance creating the Richmond procurement system on December 20, 1982.[6] It added the "Plan" by an amendment to

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[6] Richmond Va. Ordinance No. 82-294-270.

the procurement system on April 11, 1983.[7] The City states that it derives its authority to enact both the general procurement ordinance and the Plan portion of it from section 11-35(D) of the state law. It argues that since its "set aside" ordinance fosters competition, the authority to enact it is implied in section 11-35(D). Croson does not argue that the City's basic procurement ordinance is invalid. It contends, however, that the Plan is not "based on competitive principles" and that it is contrary to the public policy of Virginia.

We think Croson's first contention ignores the continuing anti-competitive effects of past discrimination. The Richmond City Council had before it an

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[7] Richmond Va. Ordinance No. 83-69-59. It was later amended by Ordinance No. 83-127-116 on June 20, 1983.

empirical study that, while one-half of the City's population were members of minority groups, minority-owned business enterprises received virtually none of the city contracts awarded during the five year period 1978-1983. By encouraging minority-owned businesses to enter an area of economic activity where they have previously been absent, the Plan will very likely increase competition as MBEs and teams of MBEs and non-MBEs vie for public contracts. Furthermore, the Plan does not alter the fundamental competitiveness of the bidding process; even under the City's ordinance, the City will award contracts to the "lowest responsive and responsible bidder." Richmond, Va. Code Ch. 24.1, Article IV, § 14(a). Accordingly, we agree with the City and Judge Merhige that the Plan is "based on competitive principles" and therefore that the

authority for the adoption of the set-aside Plan is "fairly implied" from the power expressly granted to Richmond to develop its own procurement procedures under section 11-35(D) of the Virginia Public Procurement Act.

Croson bases its second argument that the Plan is contrary to public policy and therefore invalid on section 11-44 which provides:

> In the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror.

We agree with the district court that the Plan is not contrary to the public policy of Virginia expressed in Code section 11-44. In the first place, as we have held, the City's Plan is specifically exempted from this and other requirements of the state procurement scheme[8] by section 11-35(D) since it is adopted by an ordinance "based on

competitive principles." The exemption, however, is not necessary to refute the assertion that the Plan is contrary to public policy. Croson ignores the policy implications of section 11-48, which is devoted to encouraging the participation of minority businesses in the performance of public contracting. Section 11-48 provides:

> All public bodies shall establish programs consistent with all the provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions...State agencies shall submit annual progress reports on minority business procurement to the State Office of Minority Business Enterprise.

Further, at the time sections 11-44 and 11-48 were enacted by the Virginia legislature, it was well established that federal statutes prohibiting racial

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[8] Exempt public bodies are only subject to certain sections of the public procurement act not germane to the issues in this appeal.

discrimination do not necessarily prohibit race-conscious programs designed to remedy the effects of historical racial discrimination. As the district court said:

> Plaintiffs fail to recognize that the word "discriminate" is not self-defining, especially in the context of legislation addressing race relations. In that context, the word does not necessarily proscribe programs that create preferences for blacks and other groups that have historically been the victims of discrimination. See, e.g., United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979).

Croson v. Richmond, No. 84-0021-R, Slip op. at 19, (E.D.Va. December 3, 1984).

Croson asserts, however, that even if the Virginia legislature implicitly intended to authorize minority set-aside programs such as the Richmond Plan, these programs violate Article I, Section 11 of the Virginia Constitution. This Virginia Constitutional article states that "the right to be free from any governmental

discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Croson argues that in testing the Plan under this article, the Virginia Supreme Court would apply the strict scrutiny standard because the Plan promotes discrimination based on race. See Duke v. County of Pulaski, 219 Va. 428, 432-33, 247 S.E.2d 824 (1978).

As the parties conceded below, however, the Virginia Supreme Court has interpreted Article I, section 11 "[to be] no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973). See also Schilling v. Bedford Cty. Memorial Hosp., 255 Va. 539, 303 S.E.2d 905, 907 n.2 (1983). Croson also argues that the Plan violates the equal protection clause of

the United States Constitution's fourteenth amendment. Not only does the resolution of that fourteenth amendment issue answer the argument based on the Virginia Constitution, but it is the principal issue in this appeal.

IV.

The Supreme Court in Fullilove v. Klutznick, 448 U.S. 448 (1980) upheld a minority set aside plan which had been attacked as violative of the equal protection clause of the fourteenth amendment. In the past five years, several circuit courts of appeal as well as state supreme courts have followed and amplified the various rationale of the Court's opinions in Fullilove. South Florida, 723 F.2d 846; Ohio Contractors, 713 F.2d 167; Schmidt, 662 F.2d 550; Southwest Washington Chapter, 667 P.2d 1082; contra Arrington, 403 So.2d 893. Although the Constitution does not

require such affirmative action plans to rectify past discrimination, there is now no question but that constitutionally they may be imposed. There is also little question but that such plans may be implemented by states or their political subdivisions as well as by Congress or private entities. See United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979); South Florida, 723 F.2d at 852; Ohio Contractors, 713 F.2d at 172; Schmidt, 662 F.2d at 557. Our chore, then, is relatively straightforward--we must determine simply if the Richmond City Plan fits the constitutional mold shaped by the Supreme Court in Fullilove.

In Fullilove, the Supreme Court upheld the 10% set-aside provision of the federal Public Works Employment Act, ("PWEA") 42 U.S.C. § 6705(f)(2) (1982). That provision required state and local

governments applying for federal grants for public works projects to provide assurances that at least 10% of the grant would be expended through minority business enterprises. The statute provided for administrative waivers of the 10% requirement in some instances. While no single standard of analysis for minority set aside programs emerged from the Court's several opinions, the opinions authored by the Chief Justice and by Justice Powell, particularly, have provided the basis for development of standards for judicial review of the set-aside plans. The Chief Justice, writing for himself and Justices Powell and White, employed a three-part standard, examining the statute in order to determine whether (1) the purpose of the program was remedial, i.e. designed to eliminate practices that might serve to perpetuate the effects of prior

discrimination, (2) the objective was within Congress' authority, and (3) the means employed were "narrowly tailored" to achieve the remedial goal. 448 U.S. at 473, 490.

In a concurring opinion, Justice Powell, invoking, as the Chief Justice had not, the traditional strict scrutiny standard, examined the basis of Congress' authority to adopt the program and inquired whether the racial classification served a "compelling" state interest. According to Justice Powell, the interest could not be found to be compelling unless it satisfied a two-part test:

> (1) The governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination; and
>
> (2) The governmental body must make findings that demonstrate the existence of illegal discrimination.

Fullilove, 448 U.S. at 498. Even if the government has proffered a compelling state interest, the court must then determine that the means selected by the governmental body is narrowly drawn to fulfill the governmental purpose. Id. See also South Florida, 723 F.2d at 851-52. In his analysis, Justice Powell noted the factors which various Courts of Appeals had used in reviewing remedial hiring programs; he then utilized these factors in analyzing the congressional program aimed at assisting minority contractors. These factors included (1) the efficacy of alternative remedies, (2) the planned duration of the plan, (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, (4) the availability of waiver provisions if the hiring plan could not be met, and

(5) the effect of the set-aside plan on innocent third parties. Fullilove, 448 U.S. at 510-11, 514-15.

The concurring opinion of Justice Marshall and two other justices stated that an intermediate level of scrutiny should govern review of minority set-aside programs and such programs are constitutionally valid as long as the means chosen are "substantially related" to the avowed remedial purpose. Id. at 519.

The district court in this case recognized the Supreme Court's internal disagreement as to the proper analysis for minority set-aside programs and adopted the approach employed by the Eleventh Circuit in South Florida, 723 F.2d at 851-52, as a proper synthesis of the various Fullilove concerns. This test requires that for a minority set-aside plan to be constitutional:

> (1) [that] the governmental body have the authority to pass such legislation; (2) [that] adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; (3) [that] the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

723 F.2d at 851-52.

We agree with the Eleventh Circuit and the district court that this test sufficiently captures the common concerns articulated by the various Supreme Court opinions to provide a general guideline for judging the constitutionality of a set-aside plan.

(a)

As we have noted, supra, there is little doubt that state political subdivisions, if authorized by state law, generally have authority under the United States Constitution to enact minority set-aside programs. See South Florida,

723 F.2d at 852; Ohio Contractors, 713 F.2d at 172. We held in part III of this opinion that the city's authority emanated from the Virginia Legislature. No prolonged discussion then, is needed to demonstrate the Plan's compliance with the first prong of the South Florida test.

(b)

The second requirement of the synthesized Fullilove test is that the governmental body adopting a remedial plan make adequate findings to ensure that it is remedying the present effects of prior discrimination rather than advancing one racial group's interest over another. In reviewing the findings of the Richmond City Council to determine if they satisfy this aspect of the constitutional test, we must maintain the proper perspective of our appellate task. We review not the findings of fact which

underly a judicial decision but those of a legislative branch of government (here a division of state government) to determine if it has carried out its function in a constitutionally acceptable manner. Our review would be more intrusive into the fact-finding process and the limitations we impose on the finders of fact would be stricter if we were reviewing a judicially created remedy. The opinions of the Fullilove Court emphasize the fundamental difference between appellate review of judicially created remedies and legislatively created ones. In his detailed presentation of the background to the congressional findings in the public works set-aside provision, the Chief Justice underscored the broad scope of the fact-finding authority of Congress. Fullilove, 448 U.S. at 483-84. Justice Powell, writing at length to

distinguish the standard for reviewing legislative finding from the normal standard of review of judicial findings, stated:

> Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on § 103(f)(2) as the complete "record" of congressional decisionmaking underlying that statute is essentailly a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law.
>
> ...
>
> Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative

> history of § 103(f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

Id. at 502-503.

The Chief Justice reviewed in great detail "the total contemporary record of congressional action dealing with the problem of racial discrimination." Id. at 463-67. He noted the ongoing effort by the national government through such agencies as the Small Business Administration and the Office of Minority Business Enterprise to remedy the effects of past discrimination.[9] Id. Having reviewed the breadth of congressional fact-finding in this area, the Court accepted the assertion that

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[9] Most states, including the state of Virginia, have similar offices or departments of Minority Business Enterprise. See Va. Code § 2.1-64.32 (Supp. 1985).

discrimination in the construction industry against minorities has been prevalent in this country and has seriously limited the opportunity of minorities to participate in government contracting. Id. at 461-67. Furthermore, it was not the first such recognition by the Supreme Court of the effect of discrimination on minority participation in the construction industry. In Weber, Justice Brennan noted that "[j]udicial findings of exclusions from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198, n.1.

The extensive references in the Chief Justice's and Justice Powell's opinions to Congressional power to deal with past discrimination, however, do not imply that state legislative bodies are powerless to act to remedy past

discrimination. South Florida, 723 F.2d at 852, Ohio Contractors, 713 F.2d at 172. As the Eleventh Circuit wrote in South Florida, "although the scope of Congress' power to remedy such discrimination may be greater than that of the states, state legislative bodies are not without authority to ensure equal protection...." 723 F.2d at 852.[10] The

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[10] The Sixth Circuit in Ohio Contractors wrote at greater length and more emphatically on the authority of state government in this area:

> No enabling provision is required to authorize a state government to enact legislation to prevent the denial of equal protection to persons within its jurisdiction. The prohibition against denial of equal protection carries with it the power to prevent such denial and to remedy past violations. When a state legislature takes steps in compliance with the equal protection clause it is acting in the same capacity as that of Congress in adopting legislation to implement the equal protection component of the Fifth Amendment's due process clause.

713 F.2d at 172.

legislative body of the City of Richmond, acting under authority of state law, undertook an approach similar to that which Congress took in enacting the minority set-side in the local public works program. Acting at the local level, the city council in a public legislative session reviewed the history of public procurement in Richmond with the goal of ensuring that public funds would be spent in a nondiscriminatory manner consistent with competitive practices.

Congressional findings of discrimination on a national scale would not alone justify a city legislative finding of past racial discrimination in public contracting in the City of Richmond. They are, however, relevant to the extent that the Richmond City Council determined that the City's record has been and was, in fact, a part of the

national problem. The council debate preceding the enactment of the ordinance creating the Plan demonstrates that the council was aware of the background of the nationwide remedial programs. Proponents pointedly referred to the national background and, importantly, asserted that such discrimination existed in Richmond--a fact not denied by opposing witnesses nor opponents within the council. The council and witnesses, both for and against the Plan,[11] had available complete historical records of city contracting and specifically a statistical study showing that minorities, who constituted 50% of the City's population, had received over a five-year period only 0.67% of the City's contracting business. The debate in council was sharply joined, and there can be no doubt that the legislative issue was well defined. The vote adopting the

Plan was not unanimous--six voted for it--three against it.

Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council

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[11]The Council heard from: Esther Cooper, MBE owner; Freddie Ray, President of Task Force for Historic Preservation in Minority Communities; Stephen Watts, attorney representing Associated General Contractors of Virginia; Richard Beck, president of a local plumbing contractors' association; Mark Singer, from the electrical contractors' association; Patrick Murphy, American Subcontractors Association; Al Shuman, Professional Estimators Association. In the debate on the ordinance, opponents contended that there was an insufficient number of minority contractors to operate the Plan as proposed, and that implementation of the Plan would lead to inflated bids and would not be conducive to top quality work. Proponents of the Plan, including members of the council, emphasized the history of discrimination in the construction industry, the current difficulties encountered by MBEs in the Richmond area, and the success of similar set-aside programs in other parts of the country. Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council, April 11, 1983.

majority's position in any traditional sense of weighing evidence. Rather, it is to determine whether "the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." Fullilove, 448 U.S. at 503, (Powell, J. concurring). Considering the total information available to the council, we think its conclusion was reasonable.[12] In short, in our view, the information considered by the Richmond City Council, gathered and demonstrated through the public hearing and study, was adequate to ensure that the Plan was adopted to remedy the effect of past discrimination rather than advancing one group's interest over another.[13]

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[12]The Chief Justice thought Congress could take "necessary and proper action" to remedy the effects of past discrimination where "there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities...." Fullilove, 448 U.S. at 475. The Chief Justice observed that, "Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitute to try new techniques...." Id. at 490. Justice Powell's standard for review of legislative fact-finding is stricter, requiring that a congressional finding be "reasonable." Id. at 503 n.4. Because the Richmond Plan satisfies the stricter test, we need not decide which, as a general rule, would be the more appropriate test.

[13]As we have stated, the council's findings are supported by more than bare statistics. It is, therefore, unnecessary to address the question of whether statistical evidence alone is sufficient to provide factual underpinnings for implementation of a set-aside program. Compare Janowiak v. City of South Bend, 750 F.2d 557, 563 (7th Cir. 1984) (statistics alone insufficent) with Johnson v. Transp. Agency, 748 F.2d 1308, 1310 n.2 (9th Cir. 1984) (statistical evidence of conspicuous imbalance in workforce adequate).

(c)

The third prong of the Fullilove test is that the program extend no further than the established need of remedying the effects of past discrimination. In applying the third prong, we evaluate the Plan in light of the requirement set forth in the Chief Justice's opinion in Fullilove that the remedy be narrowly tailored to the legislative goals of the Plan. 448 U.S. at 490. We also consider a number of factors identified by Justice Powell in his concurring opinion in Fullilove, such as duration, availability of waiver provisions, relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, and the effect on innocent third parties. Id. at 510-11, 514.

Croson contends that, even if there were sufficient evidence of past discrimination to justify a remedial plan, the Plan is an overextensive response, not narrowly tailored to accomplish the intended remedial purposes. It argues principally that (1) the 30% set-aside figure is unreasonable, and (2) the Plan lacks an effective waiver provision to protect it against abuses. The district court exhaustively analyzed these arguments and concluded that the Plan was valid, and we agree.

Croson asserts that the district court erred in its assessment of the reasonableness of the 30% set-aside requirement by not comparing the 30% figure to the percentage of MBEs in the area. We disagree. Although there are currently few MBEs in the Richmond area, we think the establishment of a 30% set-aside requirement for a five-year

period, with adequate waiver provisions, is reasonable in light of the undisputed fact that minorities constitute 50% of the population of Richmond.[14] A set-aside limited to the current percentage of minority contractors would offer no remedy to eliminate the continuing consequences of the discrimination which has resulted in the present low level of minority

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[14]Presumably, in its five year period of existence, the Plan will have encouraged a sufficent number of minority businesses that the forces of competition could then rectify the lingering effects of past discrimination. The authorization of the Plan for five years evidences the Council's intention not to give a permanent preference to one racial group, but to offer a narrowly tailored, finite remedy of the current effects of past discrimination. In view of the scope of the problem identified by the City Council, a five year plan is, in our view, unquestionably reasonable. Any new affirmative action plan enacted after that time would be subject to renewed scrutiny through a different glass.

participation in government contracting. In remedying the effects of past discrimination, a set-aside program for a period of five years obviously must require more than a 0.67% set-aside to encourage minorities to enter the contarcting industry and to allow existing minority contractors to grow. See Fullilove, 448 U.S. at 513-14 (Powell, J., concurring) (10% set-aside reasonable, where 17% of the population and only 4% of the contractors were minority group members); Southwest Washington Chapter, 667 P.2d at 1101 (MBE participation goal of 11% set at slightly less than county's minority population held reasonable); Schmidt, 662 F.2d at 559, vacated on other grounds, 457 U.S. 594 (1982), (25% goal reasonable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of state statutory issue prior to

deciding constitutional claim). Common sense dictates that judging the set-aside percentage by reference to the existing small proportion of MBEs in the economy would tend to perpetuate rather than alleviate past discrimination. Such a standard would thwart the Plan's remedial purpose of encouraging the development of minority-owned businesses by providing ample opportunity for MBEs to obtain construction contracts. As Justice Powell noted, the Supreme Court "has not required remedial plans to be limited to the least restrictive means of implementation." Fullilove, 448 U.S. at 508.

Both the Chief Justice and Justice Powell in Fullilove emphasized the importance of waiver provisions in minority set-aside plans. 448 U.S. at 487-89, 514. The Chief Justice recognized that in certain market areas,

grantees would be unable to meet the 10% requirement despite their best efforts. Id. at 488. The Court was also sensitive to the possibility that minority set-asides might prove counterproductive--that rather than rectifying the effects of past discrimination, they might allow MBEs to exploit the remedial aspect of the program by charging unreasonable prices or enable sham minority companies to gain competitive advantages. Id. at 487-88. Courts of appeals responding to Fullilove have also recognized the importance of adequate safeguards designed to avoid future favoritism based on race. See South Florida, 723 F.2d at 853-54; Ohio Contractors, 713 F.2d at 174.

In Croson's argument that the Plan is not narrowly tailored, it generally urges that the council adopted a plan parallel to the one approved in

Fullilove, but without the administrative provisions which shaped the Fullilove plan to its narrow role. Croson alleges that the Richmond Plan contains no adequate waiver provisions to give it relief from its claimed inability to obtain a responsible MBE subcontractor at a competitive price.

The MBE statutory provision approved in Fullilove "outlin[ed] only the bare bones" of a program, but made a sufficient number of "critical determinations" so that Congress could permissibly rely upon "the administrative agency to flesh out this skeleton." Fullilove, 448 U.S. at 468. The structure of the Richmond Plan sufficiently parallels the federal plan to meet Croson's general objections. We believe that the administrative regulations promulgated pursuant to the ordinance provided adequate waiver

procedures to protect the City and non-MBEs from possible abuse of the Plan by MBEs and to provide relief to non-MBEs where the Plan's requirement cannot be achieved. In judging the adequacy of the waiver provision of the Richmond Plan, we note first that for a minority business to be considered under the general procurement ordinance it must be "responsible." The Richmond Plan authorizes the Director of the Department of General Services to promulgate rules which "shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." Richmond, Va., Code Ch. 24.1, Art. VIII-A(B). Pursuant to this city legislative provision, the Director promulgated "purchasing procedures"[15] and an explanation of the required contract clauses.[16] Among other

things, the "purchase procedure" provides that the appropriate city officer must:

9. Verify that the Minority Business Enterprise (MBE) is a minority-owned and controlled business.

10. Approve or disapprove the apparent low bidder's Minority Business Utilization Form and/or make recommendations for any partial or complete waiver.

11. Disapprovals, or any types of waivers, shall be returned to the Department of General Services accompanied by a written explanation.

12. Return the Minority Business Utilization Form, UP-1 to the Department of General Services with a recommendation for approval, disapproval, partial or complete waiver within three (3) working days.

...

14. Approve or disapprove waiver, if required.

15. Award the construction contract to the lowest responsive and responsible bidder as certified to by the Human Relations Commission as being in compliance with the Minority Business

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[15] Appendix A to this opinion.

[16] Appendix B hereto.

Utilization Plan (ORD. NO. 83-69-59, adopted April 11, 1983).

Purchasing Procedure No. 61, City of Richmond, Minority Business Utilization Plan.

> The "contract clause" instructions provide:
>
> To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.
>
> In the event a bidder is unable to find a MBE to participate in the contract, the bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

Contract Clauses, Minority Business Utilization Plan, ¶D, H.

The Plan's waiver requirements are similar to those upheld in Fullilove.

448 U.S. at 494 (appendix to opinion of Burger, C.J.). A non-MBE may obtain a waiver by showing that it made every reasonable attempt to comply with the 30% requirement, but that a sufficient number of qualified MBEs were unavailable or unwilling to participate in the contract. This procedure enables a non-MBE to seek a waiver where the minority contractor is nonresponsive or irresponsible. Croson failed to make the necessary showing. Judge Merhige determined that Croson had made no allegation to the City that Continental had engaged in "price gouging;" it merely alluded to the fact that Continental's price was "substantially higher" than any other price quotation. Croson, slip opinion at 39. The City considered this complaint and denied the request on this and other grounds. If Croson had attempted to demonstrate that Continental had sought

to charge an improperly high amount, the City would have had to determine the validity of the allegation consistent with the City's obligation to conduct the review process in a thorough and substantive manner. See South Florida, 723 F.2d at 854. Similarly, if Croson had been more diligent in its search for an MBE, its assertion of Continental's untimeliness might have been grounds for granting a waiver. Croson's conduct, however, hardly bolsters its claim of unfair treatment, and the fact that the City considered and refused Croson's request for a waiver does not support its claim of invalidity of the Plan. In sum, we find that the Richmond Plan, as complemented by its administrative procedures, possesses adequate assurances that waivers can be obtained to avoid improper use of the Plan inconsistent

with the purpose of remedying the effects of past discrimination.

Croson finally argues that the Plan lacks an adequate appeal mechanism by which such decisions can be reviewed. In the first place, we have found no authority for the proposition that an appeals procedure is a constitutional requirement for set-aside programs. Assuming such a requirement, however, we think the City's procedure is adequate. The City provides a method by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. Code Ch. 24.1, Art. VII(C). A disappointed bidder not awarded a contract because it failed to obtain a waiver can protest the award under this procedure. In this case, of course, the City decided to re-bid the contract, so there was no award. Absent any showing, however, that the City is wielding its

authority to rebid contracts in order to circumvent the appeals procedure, we see no constitutional defect in delaying the availability of an appeal until after the City actually makes a decision to award a contract.

V.

Croson next contends that even if the Plan facially meets Fullilove standards, the City unconstitutionally applied the Plan to Croson's bid on the City jail project. Croson asserts that the City acted unconstitutionally when it denied Croson's request for a waiver because Continental was "unqualified," its price inflated, and its quotation presented after the bid opening. This action, Croson urges, is a further demonstration that the Plan, if not facially rigid, is made inflexible by the manner in which the City administers the Plan and that the very arbitrariness of

the City's action makes the program unconstitutional as applied to it.

In the first place, a review of the evidence reveals that Continental was qualified to provide the fixtures called for in the contract. Continental appeared on the state listing of MBEs that performed plumbing work and Rose, the Acorn Manufacturer's representative, authorized Continental to be a distributor of Acorn products. The district court found that the price quoted by Continental, though somewhat higher than other quotations, was not so high as to indicate that Continental was taking advantage of the Plan. In reviewing the City's action to see if it acted arbitrarily, we, of course, view all the circumstances upon which it based its decision. No searching inquiry is necessary to reveal Croson's less than exemplary attempts to comply with the

requirements of the Plan. According to its own records, its attempt to engage an MBE consisted of telephone calls to six minority businesses in one ten-minute flurry of activity and equally ineffective follow-up procedures. One of these MBEs denied talking to Bonn. Two others testified that Bonn ignored their specific request for follow-up information to allow them to bid. They also testified that they likely would have provided quotations if Bonn had been serious in his approach. Finally, in light of Bonn's continuing efforts to obtain a waiver though fully aware of Continental's ongoing efforts to submit a quotation, the record hardly supports a conclusion that Croson gave the Plan a chance to work as it was designed. The district court found the Plan facially sufficient. We agree. The district court likewise could find no way in which

this facially sufficient Plan was unconstitutionally applied to Croson. Nor can we. We do not address Croson's other conclusory attacks on the Plan made without supporting argument.

VI.

The City appeals the district court's denial of attorney's fees under 42 U.S.C. § 1988. Finding that Croson's action was not palpably "vexatious, frivolous, or brought to harass or embarass the defendant," Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983), we affirm the district court's denial of attorney's fees.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

APPENDIX A

PURCHASING PROCEDURE NO. 61
Minority Business Utilization Plan

Under City Ordinance No. 83-69-59, adopted April 11, 1983, the Director of General Services is authorized to develop the policies and procedures for implementation of the City's Minority Business Utilizatin Plan. The procedures outlined below shall be followed when developing a construction contract for the City of Richmond:

RESPONSIBILITY

Using Agency

(Dept. of Public Works and

Dept. of Utilities only)

ACTION

1. Determines whether the proposed contract falls within the definition of a construction contract as defined below.

   Definition: Building, altering, repairing, improving or demolishing

any structure, building or road, street, or highway, and any draining, dredging, excavation, grading or similar work upon real property.

2. Provided that the contract is a construction project, include the contract clauses - Minority Business Utilization Plan and the Minority Business Utilization Plan Commitment Form, UP-1, (3 green pages) in the bid package. Indicate in the Notice to Bidders section of the bid package, that, this is a construction contract which is governed under the provisions of City Ordinance No. 83-69-5 adopted April 11, 1983.

Department of General Services

3. For construction contracts for agencies other than the Department of Public Works and the Department of Public Utilities, accomplish the

tasks indicated in paragraphs 1 and 2, above.

4. After the bid opening, assure that all invitations for bids submitted for construction projects as defined in paragraph 1, above, contains a Minority Business Utilization Commitment Form, UP-1. If the Minority Business Utilization Commitment Form, UP-1 is missing, or is incomplete, request the contractor who appears to be the apparent low bidder to complete his Minority Business Utilization Form and advise the contractor that he/she has ten (10) days from the date of the bid opening to return the completed form, naming the minority firm or firms to be employed and ownership percentages and specifying the dollar amount and percentage of the contract awarded, by firm(s).

5. Assure that Bid Bond and other bidding requirements have been met by the contractor for his or her responsiveness to the Invitation for Bid.

6. Forward the construction Invitation for Bid package to the Using Agency for recommendation and review.

7. Refer the apparent low, responsive, bidder's Minority Business Utilization Form, UP-1, or Request for Waiver, to the Human Relations Commission, who shall:

Human Relations Commission

8. Review the Minority Business Utilization Form to certify that the contractor plans to subcontract out thirty percent (30%) of the dollar amount of the contract.

9. Verify that the Minority Business Enterprise (MBE) is a minority-owned and controlled business.

10. Approve or disapprove the apparent low bidder's Minority Business Utilization Form and/or make recommendations for any partial or complete waiver.

11. Disapprovals, or any types of waivers, shall be returned to the Department of General Services accompanied by a written explanation.

12. Return the Minority Business Utilization Form, UP-1 to the Department of General Services with a recommendation for approval, disapproval, partial or complete waiver within three (3) working days.

<u>Department of General Services</u>

13. Review the recommendations from the Human Relations Commission and the Using Agency to resolve all nonconcurrences, if required.

14. Approve or disapprove waiver, if required.

15. Award the construction contract to the lowest responsive and responsible bidder as certified to by the Human Relations Commission as being in compliance with the Minority Business Utilization Plan (ORD. NO. 83-69-59, adopted April 11, 1983).

Using Agency

16. The Using Agency and the Human Relations Commission shall have the responsibility of monitoring the contractor's adherence to all of the contract provisions to include the Minority Business Utilization Commitment. Any discrepancies found shall be reported in writing to the Department of General Services.

APPENDIX B

CONTRACT CLAUSES

MINORITY BUSINESS UTILIZATION PLAN

THIRTY PERCENT (30%) AWARD REQUIREMENT FOR CONSTRUCTION

A. Pursuant to Ordinance No. 83-69-59 of the City of Richmond, all construction contracts shall provide for at least thirty percent (30%) of the contract amount be awarded or subcontracted to Minority Business Enterprises (MBE).

B. The bidder agrees that a minimum of thirty percent (30%) of the dollar value of any resulting contract shall be awarded or subcontracted to minority-owned businesses, contractors or subcontractors. The bidder further agrees that by signing this bid, he/she shall provide all of the information required as indicated on the Minority Business Utilization Plan Commitment Form, UP-1, dated

July 12, 1983. The bidder also agrees that he/she shall complete the aforementioned form, naming the MBE to be employed and its ownership percentages in addition to the dollar amounts and percentage of the contract awarded to such MBE within ten (10) days from the bid opening date. If the Minority Business Utilization Plan Commitment Form, UP-1 is not received by 5:00 p.m., of the 10th day following bid opening (or first business day thereafter, if the 10th day falls on a non-working day), then the award shall be cancelled and the City shall reconduct the award procedure as if bids were just being opened. The contractor who failed to arrange his commitment to a MBE during the 10-day grace period, shall be deemed to be in non-compliance with the terms of

the bid until and unless it is determined that no other bidder could comply with the MBE requirement and compliance thereto is waived by the City.

C. Contractors or proposed bidders may contact the Metropolitan Business League, phone number (804) 649-7473, the Human Relations Commission, phone number (804) 780-4111, Richmond Redevelopment and Housing Authority, phone number (804) 644-9881, State Minority Business Enterprise Office, phone number (804) 786-5560, or the Department of General Services, phone number (804) 780-6124, for assistance in locating a MBE to participate in this contract.

D. No partial or complete waiver of the foregoing requirement shall be granted by the City other than in exceptional circumstances. To

justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE goal.

E. If it appears that less than 30% of the contract funds or whatever lower percentage has been authorized by waiver will be expended to a MBE, this contract shall be suspended or terminated unless a waiver is granted.

F. By execution of the contract, the contractor agrees to cooperate with the City by providing data on MBE

utilization during the full period of the contract.

G. Failure to comply with these terms or use the MBE (or as may be modified by a waiver) as stated in the contractor's assurance shall constitute a breach of contract.

H. In the event a bidder is unable to find a MBE to participate in the contract, that bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

I. No work covered under the terms of the contract shall begin until the minimum 30% award requirements has

been met or a written waiver granted by the City has been issued.

WILKINSON, Circuit Judge, dissenting:

Though the Supreme Court has not proscribed all preferences, its decisions have recognized the dangers inherent in the classification of American citizens on the basis of their race. To protect against such dangers, the Court has directed that the remedy of racial preferences be dispensed only under strict conditions. Here the majority simply disregards the need for such conditions. It abandons the caution required by Supreme Court precedent and issues what amounts to an invitation to the uninhibited and ill-considered enactment of racial distinctions in local ordinances across the land. I cannot support such encouragement--either by this Court or by local authorities--of classifications shown throughout the history of this country to have the

frequently-realized potential for social division and individual injustice.

I do not question for an instant the desirability of increased participation of minority business enterprises in the field of public contracts. Hasty formulas, however, only replicate the discrimination they purport to remedy and balkanize the body politic along lines of natural origin and race. The program adopted by the City of Richmond runs afoul of the boundaries within which racial preferences may be pursued. Its set-aside ordinance is defective in at least two respects.

First, the city is simply unauthorized under Virginia law to enact an ordinance of this type. The sole potential source of state authority -- allowing municipalities to enact procurement policies consistent with "competitive principles" -- is directly

contrary to the existence of a power to enact racial set-asides. It stretches the imagination to conclude that a dispensation of preferment on a basis wholly unrelated to performance or cost is consistent with competitive principles. Moreover, within the context of competition, this ordinance establishes an especially egregious regime of racial discrimination. Unlike other set-asides, it does not require minority subcontractor participation in all contracts, but draws further racial classifications by requiring only non-minority prime contractors to abide by its strictures.

Second, the factual findings made by the Richmond city council are woefully inadequate, as a matter of federal law, to ensure that the ordinance does more than "merely express [] a . . . desire to prefer one racial or ethnic group over

another." Fullilove v. Klutznick, 448 U.S. 448, 497 (Powell, J. concurring). The findings made here pay scarcely more than lip service to the indispensable preconditions for racial preferences by government. They neither support a conclusion of discrimination nor suggest the boundaries for a remedy were the need properly established. If we uphold a racial preference built on a foundation so infirm, we have in effect dispensed with the requirement for any findings at all. Local authorities need only recite an approved purpose and their racial preference will stand. I would have thought it obvious that even the best intentions of lawmakers, standing alone, are inadequate to ensure that preferences do not, in fact, diminish the dignity that resides within all individuals regardless of their race.

I

It is clear that Virginia law limits the powers of local authorities to enact racial set-asides in public contracts. This Court is duty-bound to consider and abide by those limits. See Schmidt v. Oakland Unified School District, 457 U.S. 594 (1982). We do not write on a clean slate of state law, for Virginia has made clear both the severity of its limitations on municipal authority and the centrality of its concern for competition in public contracts. The putative grant of local authority here is the power to enact procedures of procurement "based on competitive principles." Va. Code § 11.35(D). The set-aside, however, introduces into the procurement process a factor wholly irrelevant to competitive concerns -- the racial status of those who own or control a particular business. To equate, as

does the majority, the race-neutrality of competitive contracting with the race-consciousness of numerical set-asides is to disregard principles of competition and flout settled Virginia law.

The majority misapprehends the relationship between state and local government in Virginia. The Dillon Rule limits the powers of local governing bodies to "those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensible." Board of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). See 1 J. Dillon, Commentaries on the Law of Municipal Corporations, § 237 (5th ed. 1911). Under this rule, the state legislature is the source of all municipal authority, and its grants of authority are to be narrowly construed.

Despite the dilution of the Dillon Rule in other jurisdictions, Virginia continues to follow it closely. See County Board v. Brown, ____ Va. ____, 329 S.E.2d 468 (1985). The General Assembly refused to follow the recommendation of the Commission on Constitutional Revision that the rule be reversed. Instead, the Assembly deleted the proposed repeal of the Dillon Rule from the revised state constitution. See Horne, 215 S.E.2d at 456; Spain, The General Assembly and Local Government: Legislating a Constitution 1969-70, 8 U. Rich. L. Rev. 287, 403-04 (1974).

The force of the Dillon Rule in Virginia is evident from the strictness with which it is applied. Absent an express grant of the specific power in question, the Supreme Court of Virginia rarely upholds local authority to exercise the power. See e.g., Brown, 329

S.E.2d 468 (authority to lease "unused" county land does not allow locality to lease parking lot to a developer); Tabler v. Board of Supervisors, 221 Va. 200, 269 S.E.2d 358 (1980) (authority to regulate trash does not allow locality to require deposits on disposable containers); Horne, 215 S.E.2d 453 (authority to require subdivision plat approval does not allow locality to suspend filing of applications for such approval).

The Supreme Court implies local power only where an express power would be rendered ineffective absent the implication. See e.g., Gordon v. Board of Supervisors, 207 Va. 827, 153 S.E.2d 270 (1967) (authority to create commission to develop airport necessarily includes power to lend money to commission because without such power, commission would be rendered ineffective); Light v. City of Danville,

168 Va. 181, 190 S.E.2d 276 (1937) (authority to build dam necessarily includes power to condemn land for that purpose). It does not imply grants of power to localities on matters of public policy as sensitive and controversial as that in issue here. See Commonwealth v. County Board, 217 Va. 558, 232 S.E.2d 30 (1977) (authority to bargain with public employee union not implied from power to enter into contracts, to hire employees, and to fix terms and conditions of employment). And it would never imply a grant of municipal power in the face of such strong statutory language to the contrary.

Against this backdrop of restrictive state law, the majority's implication of the city's power to enact a racial set-aside is simply untenable. The majority does not contend that the power to adopt this program is expressly

granted by the Virginia Public Procurement Act. Instead, it concludes that the power is "fairly implied" from the grant of authority to base procurement policies "on competitive principles." Far from being implied, however, the exercise of local authority here contradicts the state requirement. The power implied by the majority, consequently, finds its source in sheer judicial fiat rather than in state law.

Though the Virginia Supreme Court has not to date addressed the meaning of "competitive principles" as used in the Virginia Public Procurement Act, the term can hardly be obscure, especially in the context of competitive bidding for public contracts. The General Assembly has defined the term in the procedures it requires for municipalities that do not adopt their own procurement programs. The Assembly values fair and open bidding

on terms of price and quality in the hope that public projects will be awarded to competent contractors at the lowest price possible.

The Assembly's view of "competitive principles" is evident in its statement of general policies regarding procurement. The statement reflects a concern for equality of treatment for all contractors, and a distate for arbitrary exclusions unrelated to the cost and quality of goods and services:

> To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition,

> that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.

Va. Code § 11-35.G (emphasis added).

The specific details of the state procurement plan implement its guiding principle, the achievement of high-quality, low-cost public projects. "Competitive sealed bidding" includes at least five elements: 1) written invitations to bid including specifications and contract terms, 2) public notice of the invitation to bid, 3) public opening and announcement of all bids received, 4) evaluation of bids based on requirements found in the invitation, and 5) award of the project to the lowest responsible and responsive bidder. Va. Code § 11-37. These requirements are, of course, familiar in the context of public contracts, for

their beneficial effects are well-established and widely desired.

The state's own program for local procurement therefore suggests a meaning of "competitive principles" consistent with the plain meaning of the term: a process in which every able entrant participates freely, with the yardsticks of performance being the lowest cost for the best quality. There is no hint that the state meant to employ the city's conception of competition -- one that apportions success on the basis of race.

The state, of course, was not blind to the need for minority business participation, but the way it chose to pursue that goal is revealing. It requires those municipalities following its procedures to include minorities in any direct solicitation of bids, Va. Code § 11-37, and has a general policy of encouraging minority participation in a

way "consistent with all other provisions of this chapter." Va. Code § 11-48. There are no numerical set-asides of contract or subcontract awards, but instead a general policy of encouraging minorities to enter the competitive process.

The Richmond plan, by contrast, is not an invitation to compete but a promise of preferment. It introduces into the otherwise cost- and quality-conscious system a factor wholly extraneous to those concerns. Able entrants in the market for subcontracts are denied the right to compete on equal terms. Results are predetermined in a way that does not comport with savings in the public fisc or quality in the public product.[1]

One cannot equate the Virginia requirement of "competitive principles" with "monopoly privileges in a . . .

market for a class of investors defined solely by racial characteristics." Fullilove, 448 U.S. at 532 (Stevens, J., dissenting). Here, the city of Richmond has granted minority subcontractors at least oligopoly power in 30% of all subcontracts let by non-minority prime contractors. Even a limited grant of monoply power to those not necessarily best qualified to perform a contract has adverse consequences. First, because those with such privileges have "the power to control prices or exclude competition," United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391

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[1] In contrast to the basis of authority found here, the court in South Florida Chapter of the Associated General Contractors of America v. Metropolitan Dade County, Florida, 723 F.2d 846, 852 (11th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984), found local authority based on a provision that allowed the waiver of competitive bidding. No such authority exists here to justify the set-aside.

(1956), monopoly power results in higher prices than those that would prevail under competition. See generally, F. Scherer, Industrial Market Structure and Economic Performance 14-16 (2d ed. 1980); P. Samuelson & W. Nordhaus, Economics 511-16 (12th ed. 1985). Second, the exercise of monopoly power may result in smaller output of a product than a competitive market would realize. See generally, J. Robinson, Economics of Imperfect Competition, 143-154 (2d ed. 1969). Samuelson & Nordhaus, supra at 518. These effects combine to produce a net social loss and a decline in aggregate welfare due to efficiency losses associated with monopoly power. Scherer, supra, at 459-74; Samuelson & Nordhaus, supra, at 518-19.

The facts of Croson's case illustrate vividly the adverse effects of a set-aside program that would not occur

if the city adhered to the state requirement of competitive principles. Croson in effect faced a set-aside far greater than 30%, for the supply of plumbing fixtures represented approximately 75% of the cost of the total project. Croson was obliged, therefore, to award this subcontract to a preferred subcontractor to meet the 30% set-aside. The minority subcontractor's price for the plumbing fixtures ($96,677.14) was $6,183.29 higher than the competitive market price ($90,493.85). This would represent nearly a 7% increase in the cost of these items. If Croson had bid the job using this figure, additional overhead and bond expenditures would have brought the extra cost from using the MBE to $7,663.16. Limited public funds would thus be used on a project actually requiring a much lesser expenditure, and alternative

projects -- desirable and achievable in a competitive market -- would be foregone or delayed.

The district court believed that "Croson's experience . . . establishes that the city considers it immaterial that an MBE provides a somewhat higher price than non-MBEs." It rejected the argument that "any measure that may increase the cost of a contract to the city in the short run" was inconsistent with "competitive principles" by pointing to other state requirements, such as bonding, that increase costs. Set-asides, however, are quite distinct from other cost increasing measures. Racial set-asides introduce into the process a factor far removed from the business concerns that prompted a requirement for such measures as bonds that serve to insure completion of contract work. In addition, other items

that increase costs are, consistent with the Dillon Rule, specifically authorized by the state. Bid bonds, performance bonds, and payment bonds, for example, are authorized by Va. Code §§ 11.57, 11.58, 11.61 and 11.62. Absent such authorization, there would be a serious question as to the authority of municipalities to adopt these requirements. See e.g., Tabler, 269 S.E.2d 358; Horne, 215 S.E.2d 453.[2]

[2] The majority's conjecture that the set-aside will increase competition in the long-run is unavailing. It suggests, paradoxically, that we encourage competition by use of non-competitive devices which may soon be removed, leaving those aided by such devices to confront full competition for the first time. In any event, we need not speculate about such outcomes, for the question is simply foreclosed as a matter of state law. The state has not sanctioned the abandonment of settled, commonly understood principles of competition in public contracts on the majority's surmise. It has required, instead, adherence to competitive principles throughout the operation of public procurement programs.

Even if one were to conclude that the city could generally increase costs by taking a factor such as race into account, competitive principles would require at the very least that the city do so in a neutral manner, requiring all contractors to face the same set of increased costs for subcontracting work wherever possible. The city, however, has simply not adopted such a plan. This is evident from the fact that MBE prime contractors are exempted from the MBE subcontracting requirement. These prime contractors, therefore, enjoy a competitive advantage over their non-MBE counterparts because they can compete freely on the market for the lowest priced subcontractors, regardless of racial identity. Richmond City Code, Ch. 24.1, Art. VIIIA(A).

This reliance upon race in derogation of competitive principles is,

in the last analysis, not a matter of market theory. In requiring a competitive system, the Virginia General Assembly did more than adopt an economic view. Strict procedures for competitive bidding have attempted to rid state and local government of the nemesis of kickbacks, rigged bids, and political favoritism that has bedevilled the field of public purchasing and supply almost since the advent of government. Gains in integrity have been tenuous and hard-won. To introduce a new form of favoritism invites renewed manipulations of a process which, to inspire public confidence, must remain even-handed and scrupulously fair. That this step backwards is blessed by a federal court against the aspirations of Virginia law is doubly regrettable.

II

The Richmond city council not only exceeded its authority under state law. It also failed to abide by the requirements of federal law when it enacted this set-aside. It is, of course, true that the Supreme Court has yet to articulate definitive standards for the review of such racial classifications under the equal protection clause. See e.g., Fullilove, 448 U.S. 448 (1980); University of California Regents v. Bakke, 438 U.S. 265 (1978). Few would deny, however, that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." Fullilove, 448 U.S. at 491 (Opinion of Burger, C.J.). Here the majority abdicates that responsibility by allowing a racial

preference to stand on only the barest of public records.

The need for findings prior to enactment of a racial preference is threefold. Substantial factual findings are necessary to determine whether the purported remedy is indeed aimed at past discrimination or actually represents a bald racial preference. See Fullilove, 448 U.S. at 498 (Powell, J., concurring). Secondly, a court can determine that the remedy is strictly tailored to the scope of the violation "only if it is certain that the persons shaping and implementing the plan understood the nature and extent of the past discriminatory practices." Valentine v. Smith, 654 F.2d 503, 508 (8th Cir.) cert. denied, 454 U.S. 1124 (1981). Thirdly, substantial findings protect against the casual use of racial distinctions and remind a public body of the seriousness of the step it is set to

undertake. None of these vital purposes is served by the meager findings of the Richmond City Council in this case.

The majority's attempt to label the findings in this case as legislative and hence all but immune from judicial scrutiny simply leaves localities unrestricted in enacting public distinctions based on race. Nothing the Supreme Court has said can be construed to give localities such license in this most sensitive of all constitutional arenas. Indeed, local bodies seeking to enact set-asides bear a heavier burden of justification than that required of Congress in Fullilove, and therefore must make more specific findings of discrimination before adopting racial preferences. See Fullilove, 448 U.S. at 515-16 n. 14. (Opinion of Powell, J.). Localities do not possess the unique remedial powers of the Congress over

section 5 of the Fourteenth Amendment. See id., 448 U.S. at 483-84. (Opinion of Burger, C.J.). Accordingly, they may act only in response to well-established violations of well-defined extent. Moreover, when localities adopt set-asides, it is not always clear that a majority is acting on behalf of a minority rather than in its own favor. It is heartening that many localities are now governed by members of minority communities. At the same time, enactment of set-asides in this context may represent abuse of the political process rather than remedial action to benefit true minority interests. See generally, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974).

A.

The sparse inquiry of the Richmond City Council simply failed to adduce the

significant and detailed evidence of past discrimination on which courts have conditioned use of remedial racial classifications. See Janowiak v. Corporate City of South Bend, 750 F.2d 557, 561 & 564 (7th Cir. 1984) petition for cert. filed, 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936); South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 851-53 (11th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 220 (1984); Valentine, 654 F.2d at 508. Though the council adopted the set-aside plan after a public hearing, the paucity of the evidence adduced by this hearing suggests that the council performed only the most cursory inquiry into the necessity of a program for which the constitution requires searching examination.

Only seven speakers addressed the council in the most general terms during its consideration of the set-aside at the very end of a five hour council meeting. Two spoke in favor of the plan, while five opposed it. The city manager and a city councilman stated in conclusory fashion that there was discrimination in the construction industry, though the city attorney specifically denied that the city had discriminated in any individual case in the past. Several council members referred to a study purporting to show that only.67% of the city's $124 million in construction contracts from 1978-83 had gone to minority firms. The record reveals, however, that this "study" is merely a list of city contracts without any reference whatsoever to the racial identity of any contractors. In fact, the city manager testified that overall

minority participation in city contracts was 7-8%.

To uphold a racial distinction on this record makes findings nothing more than a charade to justify a pre-conceived result. The only potentially useful evidence actually before the council was the small percentage of prime construction contracts awarded by the city to minority businesses. Statistics, however, are not self-explanatory. Instead, they function as "warning signals" that "raise questions rather than settle them" and "call for further investigations into the qualitative actions and attitudes that produce the statistical profile." United States Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination 31 (1981). See Johnson v. Transportation Agency, 748 F.2d 1308, 1319 (9th Cir. 1984) (Wallace,

J., concurring in part, dissenting in part). Where the need to show actual discrimination is so great, statistics cannot be invoked as a convenient "short-cut around the critical need for causal evaluation and analysis." Johnson, 748 F.2d at 1319. Because statistics always require inquiry and explanation, "evidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities." Janowiak, 750 F.2d at 564.

The majority, however, fails to recognize that statistical disparity suggests only the need for an inquiry, not the end of it. Though statistical disparity is consistent with a conclusion of past racial discrimination, it may also be the product of other factors. See e.g. Milliken v. Bradley, 418 U.S. 717,

756 and n.2 (1974) (Stewart, J., concurring). In particular, the availability of minority firms to perform quality work at a competitive cost must be examined. The failures of city council or prime contractors to make awards to non-existent or non-competitive concerns is more deeply regrettable than it is discriminatory. Such a finding would not support an imposition of the present competitive disadvantage on non-minority primes and subs that neither participated in nor benefitted from any prior malefaction.[3]

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[3] Though the majority attempts to excuse the threadbare nature of the Richmond findings by an argument of "incorporation by reference," we cannot simply assume, absent significant inquiry, that evidence relied on by Congress to adopt a national program supports the addition of another layer of racial preferences in this particular locality. If the broad congressional findings were crucial in supporting local set-asides, there would be little reason for judicial review of these set-asides at all. Courts have, however, felt a need to examine the set of findings in the particular locality. See e.g., Dade County, 723 F.2d at 853.

The cases upholding racial preferences present a dramatic contrast to the sparse evidence relied upon here. In Dade County, for example, the municipality's conclusion of past discriminatory practices rested not only on statistical disparity but also on evidence of "identified discrimination," 552 F.Supp. 925-26, verified by independent investigations and extensive factual findings. In Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.) vacated and remanded on other grounds, 712 F.2d 222 (6th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 703 (1984), the "inference" of intentional discrimination that arose from severe statistical disparity was supported with detailed evidence of intentional discrimination in the relevant employment context. The conclusion was further bolstered by "numerous independent studies." See id.

at 889. No such evidence was considered here; the Richmond city council relied on raw statistics. Absent further inquiry into the meaning of the numbers before it, the council's action does not proceed from a constitutional or statutory violation and hence lacks even minimal safeguards for adoption of a racial set-aside.

B.

Detailed factual findings are also necessary to ensure that, even where an identified need exists, "the use of [racial] classifications extend[s] no further than the established need of remedying the effects of past discrimination." Dade County, 723 F.2d at 852. Though factual findings alone do not ensure a "narrowly tailored" remedy, Fullilove, 448 U.S. at 490, the absence of such findings makes it impossible to limit the remedy appropriately, for there

is no evidence of the scope of past discrimination at which the program is aimed. A court can determine that the remedy substantially furthers its asserted purpose only if it is certain that the persons enacting the remedy know what it was they intended to redress. See Valentine, 654 F.2d at 508. The deficiencies in the record in this regard are even more glaring than the failure to identify the discriminatory predicate.

First, the only potential evidence of past discrimination considered by the city council was unrelated to the remedy actually adopted. The evidence of statistical disparity involved the percentage of prime contracts awarded to minority businesses by the city. In response to this evidence, the council enacted a set-aside that required increased use of minorities in subcontracts. Council, however,

considered absolutely no evidence on the minority subcontractor market. The district court essentially allowed the council to assume discrimination against minority subcontractors from evidence of minority prime contractor underrepresentation. Yet it is just such offhanded reliance upon racial assumptions that the requirement of findings is designed to inhibit. Though the two situations may be related, nothing before the council demonstrated that this was so. The nexus between violation and remedy was thus left to conjecture in violation of controlling Supreme Court precedent. See Firefighters Local Union No. 1784 v. Stotts, ____ U.S. ____, 104 S.Ct. 2576, 2588 (1984); Dayton County Board of Education v. Brinkman, 433 U.S. 406, 419-20 (1977); Milliken, 418 U.S. at 738; Swann, 402 U.S. at 16.

Second, the 30% set-aside goal emerges from a vacuum. Rather than a goal narrowly tailored to meet a specific need, the 30% figure is arbitrary and unsupported. No consideration was given, for example, to the number of minority firms available to perform contracts under this set-aside, despite the testimony of several witnesses before the city council that the set-aside goal was unrealistic. Though the waiver provisions may temper to some extent the quota, they do not absolve the city council of its responsibility to ensure that the goal chosen relates to demonstrated availability and need. Legislative bodies may not rectify arbitrary action through waiver provisions for which no guidelines or standards are even suggesed. See Richmond City Code, Ch. 24.1, Art. VIII-A(B). The absence of any support

for the percentage figure in the set-aside enhances the danger of an overbroad imposition of competitive disadvantage on non-minority contractors.

Finally, the reach of the remedy adopted here bears no relation to any geographical showing of discrimination. MBEs from all over the country may participate in the benefits of the set-aside program, yet no investigation was made as to whether any out-of-state MBEs had ever been subject to discrimination at the hands of public bodies in Richmond. Why an MBE in Pennsylvania should receive a competitive windfall in Richmond is a mystery. Surely the ordinance would have been less arbitrary if it permitted a waiver of the percentage set-aside in the event no minority subs were available in Richmond. See e.g., Ohio Contractors Association v. Keip, 713 F.2d 167, 169 (6th Cir. 1983)

(set-aside limited to minority business enterprises owned and controlled by residents of Ohio). The adoption of a broad remedy for which any affirmative support is lacking imparts a randomness to the identity of victims and beneficiaries that proper findings can do much to alleviate.

Dade County again provides a significant contrast. There, racial preferences are narrowly tailored through a series of specific steps required whenever they are to be employed. No broad remedies were enacted, instead, racial preferences are considered on a project-by-project basis. This consideration occurs in a three-stage administrative review where the whole range of race-conscious remedies -- including recruitment for competitive bidding -- may be considered. In no case may a set-aside be used unless three

certified minority contractors are available. Finally, the entire scheme of considering race-conscious remedies is subject to annual review and assessment to determine its continuing desirability. See, Dade County, 723 F.2d at 853-854. Not a one of these ameliorating features appears in the Richmond ordinance.

IV

My intention is not to find petty fault or to demean the generous impulse from which remedial preferences spring. This question is not an easy one, and the Supreme Court has struggled to reconcile the American belief in the primacy of the individual with the need to overcome a legacy of discrimination based on race. The court has not forbidden all remedial preferences. Rather it has flashed an amber light. Today the majority ignores that signal of caution. It approves the casual adoption of a crude numerical

preference that can only impair the ideal that all stand equally before the law and postpone the day of human fellowship that transcends race.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

J. A. CROSON COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-0021-R
CITY OF RICHMOND,	)	
	)	
Defendant.	)	
	)	
MEGA CONTRACTORS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-0022-R
CITY OF RICHMOND,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the memorandum this day filed and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Judgment be and the same is hereby entered in favor of the defendant, City of Richmond, in each of these causes and

it stands dismissed with its taxable costs.

The motions of the City of Richmond for counsel fees be and they are hereby DENIED.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

J. A. CROSON COMPANY, Plaintiff,	)	
v.	)	Civil Action No. 84-0021-R
CITY OF RICHMOND, Defendant.	)	
MEGA CONTRACTORS, INC., Plaintiff,	)	
v.	)	Civil Action No. 84-0022-R
CITY OF RICHMOND, Defendant.	)	

MEMORANDUM

These two cases involve a variety of state and federal challenges, both statutory and constitutional, to a program enacted by the City of Richmond (the City). The challenged program, known as the City's Minority Business Utilization Plan (the Plan), is designed

to increase the participation of minority businesses in construction contracts that the City awards, as a remedial measure for past discrimination against minorities. Plaintiffs, two non-minority contracting businesses, challenge the Plan both on its face and as applied to them.

The complaints in both cases were originally filed in state court, and were removed to this Court pursuant to 28 U.S.C. § 1441(a)--that is, jurisdiction over actions within the original jurisdiction of the federal district court but brought in a state court. This Court has original jurisdiction over the claims in this suit based on violations of federal statutory and constitutional rights pursuant to, e.g., 28 U.S.C. § 1331, and over the state statutory and constitutional claims in this suit

pursuant to the doctrine of pendent jurisdiction.

Defendant moved for partial summary judgment in both cases on the facial validity of the Plan, supported in each case with the same memorandum and materials; plaintiffs filed cross-motions for summary judgment, and, as the defendant did, filed the same supporting memorandum and materials in the two cases. Defendant then filed separate motions for summary judgment in each case with respect to each plaintiff's "as-applied" challenges; each plaintiff responded with a motion for summary judgment on its as-applied claims. After argument on these motions and the taking of ore tenus testimony, the cases are now ripe for disposition on the merits.

I. FACTS

A. The Plan on its Face. The Richmond City Council (the Council)

adopted the Plan on April 11, 1983, after a hearing on the same date.[1] At the hearing was presented a list of the City's construction contracts over the five-year period from 1978 to March 1983, which totaled $124,622,291.61; minority businesses had received only 0.67% of those contracts. The Council recognized that the City's minority population, on the other hand, was on the order of 50%.

The Plan requires all contractors who are awarded construction contracts by the City to subcontract at least 30% of the contract to minority business enterprises (MBEs).[2] Richmond, Va. Code Ch. 24.1, Art. VIII-A(A). The Plan defines an MBE as "a business at least fifty-one percent of which is owned and controlled, or fifty-one percent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one percent

of the stock of which is owned and controlled by minority group members." Richmond, Va. Code Ch. 24.1, Art. I(F)(Part B)(27.10). It defines "minority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code Ch. 24.1, Art. I(F)(Part B)(27.20).

The Plan is explicitly "remedial" and is to promote wider participation by MBEs as contractors or subcontractors in constructing public projects. Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). The Plan, which became effective thirty days after it was added to the City Code, expires of its own force on June 30, 1988. Id.

The Plan also provides that a waiver procedure be available. Richmond, Va. Code Ch. 24.1, Art. VIII-A(B). It authorizes the Director of the Department

of General Services (DGS) to promulgate the rules governing the waiver procedure, "which...shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved." Id.[3]

> In order for a non-MBE contractor to justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified MBE's (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or are unwilling to participate in the contract to enable meeting the 30% MBE Goal.

Contract Clauses ¶D. Non-MBEs are further informed that:

> In the event a bidder is unable to find a MBE to participate in the contract, that bidder shall submit a request for waiver of the 30% MBE requirement within ten (10) days of bid. The bidder shall indicate in the request for waiver what efforts were made to locate a MBE to participate and the names of firms and organizations contacted with reasons for declinations.

Contract Clauses ¶H.

The Plan requires that contractors who purport to comply with the MBE requirements, as well as contractors who request waivers, are subject to review under the Plan. The HRC must verify that any MBE in a contractor's Commitment Form "is a minority-owned and controlled business." Procedure ¶9 (emphasis original). The HRC must return the Commitment Form to DGS, with a recommendation for approval or disapproval. Procedure, ¶12. Disapprovals must be returned to DGS with a written explanation. Procedure, ¶11.

The Plan does not specifically provide for appeal of HRC or DGS decisions concerning requests for waiver or a firm's MBE status. However, once the City has made an award (or decision to award), the City Code's general procurement procedures provide for further review of decisions in the

contract award process. Under the City Code, any "bidder or offeror" may protest the award (or decision to award) by submitting a timely written protest. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).[4] Any such protest must state the basis and the relief sought. A written decision on the protest must issue within ten days stating the reasons for the action taken. Such decisions are appealable. See id. This protest mechanism thus allows dissatisfied contractors to challenge the approval or rejection of a firm as an MBE, and the approval or rejection of a request for waiver, once the City has made an award or announced a decision to award.

B. The Plan as Applied: Croson.

J. A. Croson Company (Croson) is in the mechanical-,plumbing-, and heating-contracting business. An Ohio corporation licensed to do business in

Virginia, Croson's principal place of business in Virginia is Richmond. Mr. Eugene Bonn is Croson's regional manager in Richmond. Bonn personally prepared all of Croson's bid documents in connection with a project involving the provision and installation of certain plumbing fixtures at the City Jail. Croson's experience with the bidding for that project is the basis of its "as-applied" challenge to the City's Plan. In particular, Croson complains that the City improperly denied its request for waiver of the MBE requirements.

On September 6, 1983, the City issued its invitation to bid on the project. The last day on which a bid could be submitted was October 12, 1983. On or about September 30, Bonn obtained the bid documents. The bid involved stainless steel urinals and water

closets. Products of either of two manufacturers--Acorn Engineering Company (Acorn), or Bradley Manufacturing Company (Bradley) were specified. Bonn determined that the 30% MBE requirement could only be met if the MBE supplied the fixtures.

On September 30, Bonn telephoned several MBEs that were potential suppliers of such fixtures, after contacting three state and local agencies that maintain lists of MBEs. The precise number of those MBEs that Bonn actually contacted on September 30 is unclear: Bonn maintains that he telephoned six, but it appears that he may have contacted only five.[5] Of the six Bonn may have phoned, only one was in Richmond: Continental Metal Hose (Continental). Bonn maintains that he spoke with the president of Continental, Mr. Melvin Brown on that day. Brown, however,

claims that Bonn did not speak to him until the morning of October 12, 1983--the last day on which bids could be submitted.

On the morning of October 12--the last day on which bids could be submitted--Bonn made a second round of phone calls to MBEs. These were the same MBEs Bonn purportedly called on September 30. Although his first round of calls had not yielded quotes or follow-up interest from any MBE, Bonn had better luck in his second round: Brown of Continental clearly did want to participate.

In order to be in a position to participate, Brown called two potential sources of fixtures the same day after speaking with Bonn. One potential source was Ferguson Plumbing Supply (Ferguson), a Richmond supplier that Brown had dealt with previously. Ferguson, which is not

an MBE, had already provided a quote to Croson for the fixtures in the same contract; consequently, Ferguson would not quote to Brown. Brown also contacted directly the agent of one of the two specified fixture manufacturers (Bradley). But Brown was unknown to him, and the agent was not allowed to quote to unknown suppliers until they had undergone a credit investigation. The agent informed Brown that such an investigation would take at least thirty days.

Brown and Bonn met personally the next day, October 13, at the opening of the sealed bids. Croson turned out to be the only bidder, with a bid of $126,530.00. Brown informed Bonn of the problems he had encountered in obtaining a quote for the fixtures, including his lack of credit approval from the Bradley agent. But Bonn encouraged Brown to

continue his efforts to obtain a quote in hopes that Croson would be able to use Continental as an MBE.

Nevertheless, on October 19, 1983, Bonn submitted Croson's request for waiver of the 30% MBE requirement to the City. By that date, Bonn still had not received any quote from Brown, although he knew that Brown remained interested in supplying the fixtures. In Croson's request for waiver, Bonn indicated that Brown was "unqualified." As for the other five MBEs Bonn had contacted, he indicated that they were "non-responsive" or "unable to quote."

Brown did not learn about Croson's request for waiver until about October 27. Upon learning of it, he sought from Bonn the name of the manufacturer's agent for Acorn, the other fixture manufacturer named in the bid specifications. Brown telephoned the agent, Mr. David Rose,

that same day. No credit requirements were discussed, but by October 31 Rose had provided Brown with a quote on the fixtures which Brown supplied Bonn shortly afterwards.

On October 27--the day that he learned about Croson's request for waiver--Brown contacted city authorities, as well as Acorn's representative. He called Mr. Chris Stevens, Director of Purchasing and Stores for DGS, and told Stevens that Continental could provide the fixtures specified in the jail contract. This information was relayed to Vernon Williams, the contract officer who would rule on Croson's waiver request. Williams also found that Continental was listed as an MBE plumbing supplier on a listing maintained by the State. Williams recommended that Croson's request for waiver be disapproved because an MBE was available.

The City informed Croson by letter dated November 2, 1983 that the HRC had "withheld approval" of Croson's request for waiver. The letter indicated that Croson would have ten days to submit a completed Commitment Form, and warned that a failure to do so could result in Croson's bid being considered nonresponsive.

Instead of supplying a completed Commitment Form, Bonn submitted a two-page letter for Croson, dated November 8, 1983, again requesting a waiver. Bonn argued that Continental (the presumably "available MBE"), was not qualified for purposes of the contract, and therefore was not available. Bonn pointed out that according to his own investigations, Continental was not a qualified supplier for either Acorn or Bradley. Bonn asserted that even the quote on the Acorn fixtures that

Continental had obtained was subject to credit approval. Bonn's letter also stated that Brown submitted Continental's quotation to Bonn some twenty-one days after the bid date, and that the quote, when submitted, was "substantially higher" than any other quotation.

Brown gave the City his version in a letter dated November 11, 1983. He asserted, among other things, that Acorn's representative had offered to extend to Brown the necessary credit. Brown also indicated that Bonn had not contacted him until the day that bids were due.

In a letter dated November 16, 1983, Bonn wrote the City documenting the additional costs that would arise if Continental supplied the fixtures, pursuant to the City's request for such information. The documentation showed that using Brown would increase costs by

$7,663.16. Bonn suggested that if the City, who he contended was an unqualified supplier, required Croson to subcontract with Continental, then the contract price would have to be increased accordingly.

Croson's request to have the contract price raised if the fixture work were subcontracted to Continental, as well as Croson's renewed request for a waiver, was denied by the City in a letter from the Director of DGS dated November 18, 1983. The waiver was denied on the grounds that "there does appear to be a minority supplier with the capability to participate in this project." The request to change the contract price was denied "because the City cannot modify a firm fixed price bid submitted for a project." The letter further stated that the City had elected to re-bid the project, and invited Croson to submit another bid.

Almost three weeks later, in a letter dated December 9, 1983, counsel for Croson wrote the Director of DGS requesting to exercise Croson's "right of review." The letter stated that the denial of waiver was arbitrary and capricious, asserting that Continental had delayed unreasonably in submitting a quote, that the quote was unreasonably inflated, and that no manufacturer was committed to honor Continental's quote. In a letter by one of its attorneys dated four days later (December 13, 1983), the City rejected the request for review on the grounds that the City had elected to re-bid the project and there is no appeal of such a decision. Croson commenced this lawsuit shortly thereafter.

C. The Plan as Applied: Mega. Mega Contractors, Inc. (Mega) is a general contractor in the business of highway construction and road-paving.

Mega is a Virginia corporation with its principal place of business in Rockville, a town in the vicinity of Richmond. Mega is not an MBE. Mr. Paul O. Lanier, Mega's president, owns 95% of Mega's stock. The City refused to approve as an MBE a firm, Taylan Construction Company, Inc. (Taylan), that Mega had submitted in its Commitment Form for a street re-surfacing project. The City's refusal to approve Taylan as an MBE gives rise to Mega's as-applied challenge to the City's Plan.

Mega's bid of $484,360.45 was the lowest one the City received. On September 1, 1983 Mega submitted its Commitment Form, which included 2 MBEs, including Taylan. The Commitment Form indicated that Mega would fulfill its 30% MBE requirement by subcontracting 22.9% of the dollar value of Mega's bid to Taylan; and the remaining 7.1% to the

other MBE. The City questioned the MBE status of Taylan.

Taylan is the brainchild of Lanier, Mega's president. Lanier began exploring the idea of setting up an MBE sometime after the City passed its ordinance instituting the Plan. Lanier wanted to establish an MBE in order to facilitate Mega's compliance with minority set-aside requirements. Sometime in July or early August, he spoke with Mr. Harrison L. Taylor, a black man and long-time employee of Mega, about Taylor's possible involvement in such a plan.

Taylor's business background is extremely limited. A Mega employee since beginning as a laborer in 1964, Taylor was a foreman for Mega at the time Lanier contacted him. As a foreman, his work included hiring laborers, truck drivers, and equipment operators. Taylor also maintained time sheets for men working

under his supervision. He had never prepared bidding documents, procured supplies, or engaged in other such business planning activities, and he has no formal educational background in any sort of business matters.

Taylor also had an extremely limited role in the planning and incorporation of Taylor. While Lanier had frequent contact with the attorney who drew up Taylan's corporate documents, Taylor had no such contact. Taylor's only participation was his agreeing to Lanier's general idea of setting up Taylan.

Taylan was incorporated as a stock corporation under Virginia law. As originally created, Taylan had three directors, one of whom was Taylor; however the company was later restructured in October, 1983 to make Taylor its sole director, in an attempt

to secure the City's approval of Taylan as an MBE. Lanier named Taylor as its president. Lanier also selected the other officers of Taylan. When one of those officers, Taylan's first secretary/treasurer, left that position, it was Lanier who named his replacement, although Taylan's by-laws require that its officers be elected by the Board of Directors. Taylan's Board of Directors had not met during any time pertinent to this lawsuit.

Taylor owns 51% of Taylan's issued stock, while Lanier's son owns the remaining 49%. At Lanier's suggestion, Mega financed Taylor's stock purchase in its entirety, with a loan of $6,120. Mega loaned Taylor an additional $7,140 so that Taylan would have the funds required for a Class A license. Taylor pledged to Mega his Taylan stock on August 10, 1983 as security for the note

he gave on the $13,260 loan. The note is payable on demand.

Mega is closely connected with Taylan's day-to-day operations. All of Taylan's assets are cash, and it has no payroll of its own. Both Taylor and Taylan's vice-president, Mr. J. Brent Moore are employees of Mega. Taylor himself has little involvement with Taylan's day-to-day management decisions. It is Moore who prepares Taylan's bids and quotations and handles Taylan's other financial matters. Moore does similar work for Mega, and in fact prepared Mega's bid on the road paving project at the same time he prepared Taylan's quote to Mega for the project. Taylor's own work for Taylan involves supervising fieldwork and hiring and firing employees.

After Mega submitted Taylan as one of its MBEs, the City sought additional

information about Taylan in order to verify the company's MBE status. In a letter dated September 21, 1983, Mr. Vernon Williams, a contract compliance specialist of the HRC, asked Taylor to document several items relevant to Tayla 's MBE status. Those items included Taylan's date of incorporation, incorporators, officers, investors, and number of stockshares issued. Counsel for Taylan responded, submitting the information in a letter to Williams dated September 29, 1983. In a brief letter dated October 4, 1983, Williams advised Taylor that Taylan did not meet the requirement that an MBE must be a minority owned and controlled business. Wiliams did not elaborate.

The City subsequently agreed to reconsider Taylan's MBE status. In support of Taylan's position, counsel for Taylan submitted a letter dated October

24, 1983, indicating that Taylan's corporate structure had been changed so that Taylor was the sole director, rather than one of three directors as before. The letter acknowledged close ties between Taylan and Mega, but noted that such ties between MBEs and non-MBE contractors were not unusual. Taylan's counsel also provided Williams with a "C-109" form, dated October 28, 1983 indicating that--in Taylan's day-to-day management and policy decision-making--Taylor was responsible for financial decisions and management decisions including estimating, marketing and sales, hiring and firing of personnel, and purchases of major items of supplies.

On November 1, 1983, at Williams' request, Williams and Taylor met personally at Williams' office. Williams questioned Taylor about a number of matters relating to Taylan's ownership

and management. Williams learned that Mega had loaned Taylor the money he used to buy his Taylan stock; that Taylor had no business experience; that Taylor's own responsibilities involved only supervising field work and the hiring and firng of personnel; and that Taylor was on Mega's payroll. Williams summarized these observations in a memorandum of the meeting dated November 4, 1983, and concluded that Taylan could not be an MBE because Taylan was not owned and controlled by a minority.

The Director of DGS informed Mega, in a brief letter dated November 2, 1983, that DGS was cancelling its proposed award of contract to Mega on the project because Mega had not satisfied the MBE requirement. Williams, in a letter dated November 7, 1983, informed Taylor that Taylan did not meet the requirement that an MBE be minority owned and controlled.

It is unclear what steps, if any, Mega took to obtain review by the City of the City's decision to deny Taylan's MBE status and cancel Mega's proposed contract. Mega's complaint alleges generally that Mega appealed and that the City refused to consider it. But the record does not reflect any evidence on the issue.

II. Basis for Challenge

Each plaintiff has included eight counts in its complaint; most of the which are identical. The first four counts are state-law causes of action. Count One alleges that the City's adoption of the Plan exceeded the City's powers granted by the state. The second and third counts, now withdrawn, allege that the Plan violates two provisions of the Virginia Code governing government contracting.[6] The fourth count alleges that the Plan violates the Virginia

Constitution, Article I, Section 11, because it discriminates on the basis of race in public contracting.

The last three counts are based on federal law. Count Six alleges that the Plan, both on its face and as applied, violates the due process clause of the Fourteenth Amendment because the Plan discriminates on the basis of race, and further violates 42 U.S.C. §§ 1981, 1983. Count Seven alleges the same with respect to the equal protection clause rather than the due process clause. And Count Eight alleges that the Plan both on its face and as applied, violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Count Five in Croson's complaint alleges that the HRC's denial of Croson's request for waiver and refusal to allow Croson to appeal that denial, violated Croson's due process rights guaranteed by

Article I, Section 11 of Virginia's Constitution and the due process clause of the Fourteenth Amendment. Count Five in Mega's complaint is different, alleging that the HRC violated the Plan itself by applying an unlawful test of whether a business is an MBE.

III. Discussion

Plaintiffs have already withdrawn two of their claims, as the Court has noted supra. The Court can further simplify the issues before it because plaintiffs have neither argued nor briefed their claim in Count Six, which alleges that, because the Plan discriminates on the basis of race, plaintiffs' rights under the due process clause of the Fourteenth Amendment have been violated. Plaintiff Croson does summarily re-assert, in its Memorandum in Support of Motion for Summary Judgment, that it has suffered a deprivation of

"substantive due process" as well as equal protection because the plan is racially discriminatory. But Croson refers to no case authority in support of its due process claim based on the plan's alleged racial discrimination. To the extent that Croson and Mega meant for their claim in Count Six to mean anything different from their equal protection claim asserted in Count Seven, the Court deems that claim to be abandoned.

A. Authority Under State Law.

The plaintiffs' primary state-law argument is that the Plan was adopted ultra vires, in that the City is without power to adopt a procurement ordinance that incorporates a minority set-aside program such as the Plan. Under Virginia law, the scope of a local government's authority is determined by the "Dillon Rule," which states that "local governing bodies have only those powers that are

expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Tabler v. Board of Supervisors of Fairfax County, 221 Va. 200, 202, 269 S.E. 2d 358, 359 (1980).

Virginia has not expressly authorized cities to adopt contracting set-aside programs for minorities. But it has expressly authorized the governing bodies of counties, cities, and towns to adopt policies and procedures for the procuring of goods and services. It does so through an exemption to the Virginia Public Procurement Act, Va. Code §§ 11.35 et seq., (Supp. 1984) (the "Act"). The purpose of the Act was to enunciate policies concerning government procurement from nongovernment sources. Va. Code § 11.35(B) (Supp. 1984). The Act sets out a number of specific

provisions addressing several areas of public procurement, including contract formation, payment of bills, and ethics. Local governments that choose to adopt their own procurement policies are generally exempted from the specific provisions of the Act, so long as the policies and procedures that they adopt are "based on competitive principles." Va. Code § 11.35(D)(Supp. 1984).[7]

The City's adoption of the Plan as part of its procurement procedures is not contrary to this general grant of authority to adopt alternative procurement procedures, despite plaintiffs' arguments to the contrary. Plaintiffs contend that the Plan renders the City's procurement procedures inconsistent with "competitive principles." They point out that a prime contractor, in order to fill its 30% MBE requirement, may have to take an MBE

subcontractor whose quote is not the lowest available for some of the contract specifications. Because this may lead in the short run to higher project costs for the City than would otherwise prevail, plaintiffs argue that the City's procurement procedures are not consistent with competitive principles.

The Court rejects this argument. There is no legislative history that provides any clue as to the meaning of "competitive principles," but plaintiffs' reading, in effect, would require that any measure that may increase the cost of a contract to the City in the short run to be deemed inconsistent with "competitive principles." Such a reading of "competitive principles" plainly does not conform to the legislature's intent. Other measures in public contracting, such as requiring bid bonds, performance bonds, and payment bonds, may also

increase the ultimate price of a contract to a local government. Yet such measures are specifically authorized by the State in the Act, see Va. Code §§ 11.57, 11.58, 11.61, 11.62 (Supp. 1984), no doubt because they promote such useful goals as protecting the local government against poor workmanship. The Court cannot agree with plaintiffs that if a measure may increase contract costs, then that measure is necessarily inconsistent with "competitive principles."

Further, under the Plan, there remains every incentive for both MBEs and non-MBEs to compete against one another. The Plan does not alter the fact that, under the City's procurement ordinance, bids are awarded to the "lowest responsive and responsible bidder." Richmond, Va. Code Ch. 24.1, Art. IV, § 14(a). The Plan simply changes the structure of the competition, by

requiring non-MBEs to team up, insofar as possible, with MBEs, to compete for contracts against other teams of non-MBEs and MBEs. In addition, the Plan in the long run may reduce the cost to the City of its construction contracts; after the Plan is concluded, there will probably be more firms competing for the City's business, which may result in keener competition and correspondingly lower prices than would prevail if the Plan had not been instituted. Given all this, the Court cannot find the Plan inconsistent with "competitive principles."

Plaintiffs also argue that the Plan cannot be reconciled with the general grant of authority in Section 11-35(D) because the Plan conflicts with Virginia's public policy. Local ordinances cannot conflict with the public policy of Virginia as embodied in

its statutes. See King v. Arlington County, 195 Va. 1084, 1090, 81 S.E. 2d 587, 591 (1954). Plaintiffs' argument that the Plan contravenes Virginia's public policy is based on Section 11-44 of the Virginia Code. Section 11-44 states, in pertinent part, that "in the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror." Va. Code § 11-44 (Supp. 1984).[8]

Plaintiffs fail to recognize that the word "discriminate" is not self-defining, especially in the context of legislation addressing race relations. In that context, the word does not necessarily proscribe programs that create preferences for blacks and other groups that have historically been the victims of discrimination. See, e.g.,

United Steelworkers of America v. Weber, 443 U.S. 193, 201-08 (1979) (upholding private program creating race-based hiring preference as consistent with statute making it "unlawful to discriminate...because of race" in employment). Plaintiffs have not adduced any arguments for construing Section 11-44 as prohibiting a minority set-aside program such as the Plan.

Several considerations suggest that the policy embodied in Section 11-44 should be viewed as consistent with the City's Plan, not opposed to it. First, the act of which Section 11-44 is a part includes another section, 11-48, requiring public bodies to establish programs that "facilitate the participation" of minority-owned businesses in procurement. Va. Code § 11.48 (Supp. 1984).[9] Section 11-48 does not, of course, specifically mandate

programs such as the Plan. But it does indicate that a local government's race-conscious efforts on behalf of minorities do not necessarily conflict with Section 11-44. Second, when Section 11-44 was enacted in 1982, it had been recently and clearly established that federal statutes prohibiting racial discrimination do not necessarily prohibit race-conscious programs designed to help groups that have historically suffered discrimination. See, e.g., United Steelworkers of America v. Weber, supra, 443 U.S. 193 (1979). This further suggests that the legislature did not intend for Section 11-44 to prevent a city from adopting a race-conscious preference program: arguably, the legislature would have specifically differentiated its own anti-discrimination law from the federal law on the issue, if it had intended a

difference between the two. In short, plaintiffs have failed to show that the City's Plan conflicts with any public policy embodied in Section 11-44.

Thus, the City's adoption of the Plan as part of its procurement procedures is not outside the general grant of authority in 11-35(D) to adopt alternative procurement procedures that are consistent with competitive principles. In order for the Plan's enactment to satisfy the Dillon Rule, it must also be shown that the City's authority to enact the Plan may fairly be implied. Under Virginia law, questions concerning implied legislative authority of a local governing body are resolved by analyzing the legislative intent of the General Assembly. Tabler v. Board of Supervisors, supra, 221 Va. at 202, 269 S.E. 2d at 360. Powers that the

legislature "clearly did not intend to convey" cannot be implied. Id.

There is nothing suggesting that the legislature "clearly did not intend to convey" the power to enact minority set-aside programs in municipal contracting. Further, the City's authority to enact ordinances such as the Plan can be implied from two sources already discussed. First is Section 11-35(D), which invites local governments to adopt alternative procurement procedures so long as they are consistent with competitive principles. Second is Section 11-48. Section 11-48 requires local governments that do not adopt their own procurement procedures to "establish programs consistent with all provisions of this chapter to facilitate the participation of...minorities in procurement transactions." Va. Code § 11-48 (Supp. 1984).

Plaintiffs argue that Section 11-48 cannot be read to support the set-aside program for minorities such as the City's Plan. They note that Section 11-48 requires any program to be consistent with "all provisions" of the chapter, which thus includes Section 11-44. Plaintiffs argue that Section 11-44 prohibits racial discrimination in public contracting, and that therefore the City's set-aside plan is not consistent with Section 11-44. This argument is flawed, however. As discussed supra in rejecting plaintiffs' contention that the Plan is contrary to the public policy embodied in Section 11-44, Section 11-44 does not prohibit set-aside programs for minorities.

Having concluded that the objection based on Section 11-44 is not well taken, the Court finds that Section 11-48 can be fairly read to authorize set-aside

programs for minorities, so long as such a program is constitutional. This conclusion is buttressed by the fact that such set-aside legislation had already been enacted at the federal level and upheld by the United States Supreme Court when Virginia adopted Section 11-48.[10] In such a context, if the legislature had intended the phrase "programs...to facilitate the participation of... minorities" not to include set-aside programs for minorities, it presumably would have expressed that intent in the statute or in legislative history. Yet, plaintiffs have provided nothing to suggest that the Virginia legislature meant for Section 11-48 to limit local governments to less than what is constitutionally permissible, in terms of adopting remedial programs to facilitate the participation of minorities.

Because the City's power to enact the Plan is not contrary to Section 11-35(D), and because that power may in fact be fairly implied from Section 11-35(D) and Section 11-48, the Court holds that the City's adoption of the Plan was not ultra vires.

B. Virginia Constitution's Prohibition of Racial Discrimination.

The Virginia Constitution states that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Va. Const. Art. I, § 11. Plaintiffs allege in Count Four that the Plan runs afoul of this state constitutional guarantee. As the parties agree, the Supreme Court of Virginia holds this constitutional provision to be co-extensive with the equal protection clause of the Fourteenth Amendment to the

United States Constitution. Archer v. Mayes, 213 Va. 633, 194 S.E. 2d 707 (1973). Thus, the analysis infra rejecting plaintiffs' Fourteenth Amendment equal protection claim applies to this claim as well.

C. Equal Protection Clause of the Fourteenth Amendment

Plaintiffs base much of their attack against the City's Plan on the equal protection clause of the Fourteenth Amendment. Plaintiffs do not maintain that the equal protection clause prohibits a city from adopting a set of contracting procedures that includes a race-conscious set-aside program. They do argue, however, that the Plan does not comport with the standards that the United States Supreme Court articulated in Fullilove v. Klutznick, 448 U.S. 448 (1980).

In Fullilove, the Supreme Court upheld a minority set-aside program. The United States Congress had established the challenged program through the Public Works Employment Act of 1977. That act included a provision requiring state and local governments that apply for certain federal grants for local public works projects to provide assurances that at least 10% of the grant would be expended through minority business enterprises. A "minority business enterprise" was defined as a business owned by citizens of the United States who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 448 U.S. at 454. In terms of ownership, the business must be at least 50% owned by minority group members, or if the business is publicly owned, at least 51% of the stock must be owned by minority group members. The statute also provided for administrative

waivers of the 10% requirement in some circumstances.

Although the Supreme Court in Fullilove upheld the statute against the equal protection challenge, no clear, easily-applied test emerged from the decision. The Chief Justice, writing for himself and Justices Powell and White, first examined the purpose of the program. He found that it was remedial, in that it was designed to ensure that grantees under the program would not employ procurement practices that might perpetuate the effects of prior discrimination that had impaired or foreclosed the access of minority businesses to public contracting opportunities. Fullilove, supra, 448 U.S. at 473. He then inquired whether such an objective is within Congress's authority. Id. at 473-480. Finally, the Chief Justice examined the means Congress

had chosen, focusing on whether the means are "narrowly tailored" to achieve the remedial goal. Id. at 480-89. He expressly disavowed the application of traditional formulas of equal protection analysis such as "strict scrutiny" or "intermediate scrutiny." Id. at 492.

Justice Powell wrote a separate concurrence as well, invoking the traditional "strict scrutiny" standard of equal protection. Id. at 507 (Powell, J., concurring). After examining the basis of Congress's authority to adopt the challenged program, Justice Powell inquired whether the racial classification served a "compelling" state interest, and whether the means selected are "equitable and reasonably necessary to the redress of identified discrimination." Id. at 510. In analyzing the appropriateness of the

means adopted, Justice Powell articulated five factors that should be considered.[11]

Justices Brennan and Blackmun, however, joined Justice Marshall's concurring opinion that an intermediate level rather than a strict level of scrutiny is the appropriate standard in reviewing equal protection challenges to programs that employ racial classifications for remedial purposes. Under that standard, such programs would pass muster under the equal protection clause so long as the means chosen are "substantially related" to the articulated remedial purpose. Fullilove, supra, 448 U.S. at 520-21 (Marshall, J., concurring).

A majority of the Supreme Court still have not agreed on the appropriate level of scrutiny for equal protection challenges to such programs. Since Fullilove, the Supreme Court has not

returned to the issue. And in the other leading case in which the Supreme Court addressed the question of the appropriate level of scrutiny for equal protection challenges to race-conscious remedial programs adopted by governmental institutions, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the issue was similarly unresolved. At issue in Bakke was an admissions program instituted by a state medical school. The program required the school to set aside a certain number of positions in each entering class for minorities. The Court struck down the program in a five-to-four decision. Four justices would have upheld the program, applying an intermediate level of srutiny. Justice Powell, however, applied strict scrutiny and found the program violated equal protection guarantees, while the remaining four

justices declined to reach the constitutional issue and found the program violated statutory requirements.

While fundamental issues pertaining to the equal protection analysis of race conscious remedial set-aside programs remain unresolved after Bakke and Fullilove, a number of courts have had to rule on such challenges in the meantime, especially with respect to programs instituting set-asides in government contracting.[12] Recently the Court of Appeals for the Eleventh Circuit addressed such a program. See South Florida Chapter, n. 12 supra, 723 F.2d 846. After reviewing the Bakke and Fullilove decisions and recognizing the unresolved nature of some of those fundamental issues, the Court articulated a three-part test based on its view of the "common concerns to the various views expressed in Bakke and Fullilove":

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

Id. at 851-52. The test is a fair synthesis of those concerns, and provides a useful general guideline for analyzing the equal protection issues posed by the City's Plan.

1. The City's Authority to Adopt the Plan.

Plaintiffs argue that the City has no authority, under the laws of Virginia, to adopt the Plan. In disposing of the plaintiffs' claim that the Plan is ultra vires, and therefore void under Virginia law, the Court has already rejected this contention, supra. Plaintiffs have introduced nothing further to support

their contention that the City lacks authority to adopt the Plan in the equal protection context. For the same reasons that the Court rejected plaintiffs' arguments in their state law claims, it rejects those arguments here.

2. Findings That Ensure That the Governmental Body is Remedying Present Effects of Past Discrimination and Not Advancing One Group's Interest Over Another's.

The Richmond City Council made findings sufficient to ensure that, in adopting the Plan, it was remedying present adverse effects of past discrimination in the construction industry. The City Council characterized the Plan as "remedial." See Richmond, Va. Code Ch. 24.1, Art. VIII-A(C). And the evidence before the City Council when it enacted the ordinance supports the conclusion that the participation of

minority businesses in the Richmond area construction industry in general, and the City's construction contracting in particular, continues to be adversely affected by past discrimination. Such evidence confirms the Plan's remedial goals.

It was established at the hearing that there were enormous disparities between the percentage of construction contracts awarded to minority businesses (0.67%) and the percentage of minorities in the Richmond population (about 50%) over a five-year period from 1978 to 1983. See Transcript of Hearing at 13, 49. It was also brought out at the hearing, by representations of a number of construction trade associations, that there were very few minority businesses in the construction industry at all. It was further stated by a city councilman and by the city manager that there was

discrimination and exclusion on the basis of race in the construction industry, in both Richmond and the state. There were a number of representatives of contracting associations present at the hearing, none of which denied this claim--although some of them asserted that their own organizations did not discriminate on the basis of race.

In addition to the evidence elicited at the hearing itself, the City Council enacted the Plan with Congress having already extensively documented the fact that low levels of minority business participation in the construction industry in general and government contracting in particular reflect continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 465-67 (reviewing extensive Congressional findings). This evidence, too, supports the conclusion that the

documented minimal participation of minority businesses in the City's construction contracting reflects past discrimination against minorities in the construction industry. Cf. Southwest Washington Chapter, n. 12 supra, 667 P.2d at 1100; (county council entitled to rely to some extent on more general national findings underlying federal laws).

Plaintiffs argue that the City's findings are deficient in at least two respects. First, they point out that the City failed to determine the precise percentage of minority contractors actually in the Richmond area. Although they cite no cases on point, plaintiffs apparently believe that the City is obliged to compare the proportion of its construction contracts awarded to minorities with the proportion of minority construction contractors in the area, rather than with the area's

minority population. Their belief appears to be based on the assumption that the evidence supporting findings of discrimination in the construction industry would be undermined if there were, in fact, few minority businesses. This is incorrect. The fact that few minority construction businesses even exist is consistent with, not opposed to, a finding that minorities have suffered past discrimination in the area's construction industry. It suggests, of course, that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government construction contracting in particular.

Second, plaintiffs point out that the City has not determined the extent to which minorities' businesses have been employed in the subcontracting of the City's construction work. Although

plaintiffs again cite no cases on point, they would find constitutional error in the City's relying on its study of prime contracts awarded to minority businesses. The point of this criticism is apparently that, if minority businesses received generous proportions of the City's construction contracts of the subcontract level, then the City's finding of continuing effects of past discrimination would be flawed. If minority businesses did indeed receive generous proportions of the City's construction business at the subcontract level, then plaintiffs might have a point. But they have produced no evidence suggesting that minority businesses fare any better at the subcontract level of the City's construction projects than at the prime contract level. In the absence of such evidence, and given the dismally low level of minority business participation

in the City's prime contracts and the dearth of minority businesses in the Richmond area construction industry, plaintiffs' objection borders on the frivolous.

The Court's conclusion that the City's findings are adequate is supported by the case law. There are, to be sure, cases in which minority set-aside programs in public contracting have been expressly supported with findings of specifically identified incidents of discrimination, rather than the more general evidence that was before the Council concerning present effects of past discrimination. See, e.g., South Florida Chapter v. Metropolitan Dade County, n.12 supra, 723 F.2d at 853 (past discriminatory practices had impeded development of black businesses; identified discrimination against black contractors had occurred prior to

county's affirmative action plan); Schmidt v. Oakland, supra, 662 F.2d at 558-59 (non-minority-owned contracting firms had been unwilling to participate with minority-owned firms; non-white contractors complained that they had been excluded from participation in bids of white general contractors). Such findings may support conclusions of past discrimination more strongly than the evidence here. But findings of past discrimination have also been held sufficient where the evidence was less compelling than it is here. See Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1100 ("numerous unrecorded meetings and conferences with interested parties"; preamble of ordinance recognizing underrepresentation of women and minorities in the county work force; general national and statewide findings). And in the only

case this Court located in which the governmental findings were held inadequate, those findings consisted solely of a conclusory declaration in the preamble of the ordinance. The declaration stated that the ordinance was a response to the continuing effects of past official discrimination against minorities. See Arrington v. Associated General Contractors, supra, 403 So. 2d at 896, 902. The Alabama Supreme Court noted that there was "no evidence that the ordinance was the considered response to hearings, reports, debates, or empirical studies." Id. at 902. In this case, by contrast, the Council had the benefit of a public hearing, debates, and an empirical study addressing the need for the Plan as a response to negligible participation by minority businesses in City construction projects.

In sum, there was ample evidence before the Richmond City Council to ensure that, in adopting the Plan, the Council was remedying the effects of past discrimination and not advancing one group's interests over another's.

3. Use of Racial Classifications not Extending Further Than Established Need of Remedying the Effects of Past Discrimination.

The third element of the South Florida Chapter test focuses on the means that a minority set-aside program employs. Plaintiffs identify several aspects of the Plan that they believe render it invalid as a means of remedying present effects of past discrimination. Plaintiffs and defendant both have referred to the five categories that Justice Powell has articulated in Fullilove,[13] as well as to other factors,

in evaluating the appropriateness of the means that the Plan employs.

a. Reasonableness of the percentage chosen.

Plaintiffs first complain that a set-aside of 30% is unreasonably high and therefore invalidates the Plan. They argue that, in assessing the reasonableness of a set-aside percentage for MBEs, the Court must compare the set-aside percentage with the actual percentage of MBEs in the area. They contend that it is unreasonable for the City to establish a set-aside percentage based on the proportion of minorities in the general population (about 50%) without considering the actual percentage of MBEs in the area as well. Given that all the parties agree that the actual percentage of MBEs in the area, although undetermined with precision, is well below the 30% set-aside goal mandated by

the Plan, plaintiffs argue that the Plan is unconstitutionally broad. The Court concludes to the contrary, however.

The authority plaintiffs cite is, in the Court's view, not supportive of their contention that the Plan's set-aside goal is excessive. They first focus on Justice Powell's observation in Fullilove that the 10% set-aside established in the Congressional plan at issue in that case "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the nation." Fullilove, supra, 448 U.S. at 513-14. But Justice Powell did not purport thereby to establish some formulaic test of reasonableness of the set-aside percentage based on the relationship between the percentage of minority businesses in the business community and the percentage of minorities in the

general population. Indeed, Justice Powell's remarks in the paragraph following this observation offer better guidance as to his view of how to evaluate the reasonableness of a set-aside percentage. He noted that in certain parts of the country with few minorities, the 10% goal "might be unfair if it were applied rigidly." Id. at 514. Because the congressional plan at issue included a waiver provision, which used as factors governing the issuance of a waiver "the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors," Justice Powell found nothing unreasonable about the prospect that the set-aside percentage might exceed the minorities avaiable. Id.

Similar to the remedial program upheld in Fullilove, the Plan here includes a waiver provision that takes into account the availability of MBEs and the efforts of the non-MBE contractor to find MBEs. Although the 30% MBE set-aside would be unreasonable if it were rigidly applied where no MBEs were available to fulfill the requirement, the Plan's waiver provision allows the Plan to be administered in an appropriately flexible, reasonable manner. Although plaintiffs maintain that the waiver provision has not in fact been administered in such an appropriately flexible way, alluding to Croson's experience with the waiver provision, the Court finds that Croson's experience does not establish that the waiver is inflexibly administered as discussed in more detail supra, the City's denial of

Croson's request for waiver was not unreasonable.

Plaintiffs cite a number of lower court decisions ruling on remedial minority set-aside programs since Fullilove to support their contention that the set-aside percentage is unreasonable because unrelated to the proportion of MBEs in the area. See Ohio Contractors Association v. Keip, supra, 713 F.2d at 169; M.C. West, Inc. v. Lewis, 522 F.Supp. 338, 340 (M.D. Tenn. 1981); Southwest Washington Chapter v. Pierce County, supra, 667 F.2d at 1094; Arrington v. Associated General Contractors, supra, 403 S.2d at 903. In the Arrington case, the Alabama Supreme Court noted that one of the "infirmities" in the set-aside program at issue was that there was no showing in the record of the relationship between the 10% set-aside and "the number of minority

contractors available and equipped to do city construction work." 403 So.2d at 903. The court supplied neither case authority nor reasoning, however, to support its conclusion that this was a constitutional defect. Furthermore, unlike Justice Powell in Fullilove, the Arrington Court did not take into account the effect of the waiver provision on whatever "infirmity" might otherwise exist, even though it recognized that a waiver provision was available. Id. For both of these reasons, this Court declines to follow Arrington. As for the remaining cases, none of them hold or in any way suggest that the reasonableness of a set-aside percentage must be evaluated in terms of the proportion of minority businesses in the area's business community, as opposed to the proportion of minorities in the community's general population.

Indeed, several of the decisions suggest that the percentage of minorities in the community's general population, not the percentage of minority businesses in the area's business community, is the appropriate benchmark for evaluating the reasonableness of a set-aside figure. In Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1101, the Washington Supreme Court noted that the MBE participation goal was "slightly less than the minority population in Pierce County," and found nothing unreasonable about that relationship. Similarly, in Schmidt v. Oakland Unified School District, n.12 supra, 662 F.2d at 559, the Court of Appeals for the Ninth Circuit found nothing unreasonable about a 25% minority business participation goal, given that "the Oakland population...was more than 34.5% non-white."

Judged by the standard of the percentage of minorities in the general population, the 30% MBE set-aside in the plan is not unreasonable. Richmond's minority population is 50%--well above the participation goal. Reason as well as case authority suggests that the percentage of minorities in the general population, rather than the percentage of minority firms in the business community, is an appropriate basis for evaluating the reasonableness of a minority business set-aside. One of the remedial purposes behind the Plan is to encourage the formation of minority businesses that would have developed, but for race-based discrimination in that industry. The percentage of minorities in the general population is a useful benchmark in determining what that proportion of minority businesses would be. Of course, even without discrimination against

minorities, the participation of ethnic groups in occupational or business fields may vary a great deal, depending on cultural preferences. But given that past discrimination undeniably has limited minority participation in the construction industry, it is fair to assume, for purposes of formulating remedial set-aside programs, that--absent discrimination against minorities--they would participate in a given business field in at least some rough relationship to their presence in the general population. The City's 30% MBE participation goal is hardly unreasonable, in light of these considerations.

b. Adequacy of the Waiver.

Plaintiffs contend that the Plan's waiver procedure does not provide the flexibility and fairness required of a remedial set-aside program under the

equal protection clause. The availability of a meaningful waiver provision undoubtedly has been an important factor in evaluating whether a minority set-aside plan is sufficiently narrow for equal protection purposes. See Fullilove, supra, 448 U.S. at 486-89; Southwest Washington Chapter v. Pierce County, n. 12 supra, 667 F.2d at 1101 (flexible waiver scheme is "key factor."). The Court, for the reasons which follow, rejects plaintiffs' complaints about the waiver.

Under the City's Plan, the relevant regulations provide that in order to justify a waiver, a contractor must show that it made every feasible attempt to comply, and that MBEs able to perform the subcontracts or furnish the supplies specified in the contract were unavailable or unwilling to participate in the contract. See Contract Clauses

¶D. Nevertheless, plaintiffs complain that, although the possibility of a waiver exists on paper, in fact the Plan has been administered inflexibly to require a 30% set-aside. They support this argument with reference to Croson's own experience. But, as the court discusses in more detail, supra, the City's denial of Croson's request for waiver was not unreasonable. Croson's experience does not establish that the 30% set-aside is inflexibly applied.

Plaintiffs next argue that the waiver is inadequate because there is no provision for an automatic waiver where MBEs have submitted so-called "non-competitive bids." They assert that, under Fullilove, an MBE who submits a bid that is not the lowest can only participate so long as the MBE's higher bid only reflects "costs inflated by the present effects of disadvantages or

discrimination." Fullilove, supra, 448 U.S. at 471. Because there is no formal waiver provision to account for such a situation, plaintiffs argue that the Plan is not sufficiently narrowly tailored for its remedial purposes.

This objection to the adequacy of the Plan's waiver is problematic for several reasons, however. First, while it is true that Chief Justice Burger in Fullilove observed that the set-aside plan in that case allowed for waivers where MBEs submitted prices that could not be attributed to present effects of disadvantage or discrimination, neither the Chief Justice nor any other member of the Court indicated that such a waiver is a constitutional requirement. Indeed, such a requirement would be odd. An inquiry into whether relatively high costs reflect present effects of past disadvantage or discrimination would be

difficult to administer, and very likely filled with speculation to the point that whichever party bears the burden of proof would lose the issue. Requiring such a paper inquiry would hardly seem to be an appropriate constitutional requirement.

If Fullilove does require that a minority set-aside program take account of MBE prices in some manner, however, it would be best understood as a requirement that the program provide reasonable assurances that MBEs could not abuse the program by exacting windfall prices for their goods or services. The City's Plan includes such assurances.

As the City points out, market incentives exist under the Plan for an MBE to quote its most competitive price for a project. This is because, in order for an MBE to obtain city business as a subcontractor through set-aside requirements, the prime contractor's

quote must still be the lowest. The MBE must team up with the prime contractor to submit the lowest possible bid as against other teams of MBEs and prime contractors. Further, even if such market incentives do not exist in situations where an MBE has some measure of monopoly power (because there is only one MBE available in the area to provide a certain product or service), the City would be able to exclude that MBE from participation if the MBE were to engage in price gouging, on the grounds that the MBE is not a "responsible" business. These factors provide reasonable assurance that MBEs cannot abuse the Plan to exact unwarranted profits.

Despite Croson's assertions to the contrary, the facts of the Croson case do not establish otherwise. In its letter to the City of November 8, 1983, in support of its request for waiver, Croson

alluded briefly to the fact that the price quoted by an MBE was "substantially higher" than any other quotation. Croson did not suggest in any way that the MBE was taking advantage of a monopoly situation. Before finally denying Croson's request for waiver, the City sought and received from Croson documentation of the extent to which the MBE's quote exceeded Croson's earlier quote. Again Croson did not suggest that the MBE's higher price reflected any attempt by the MBE to charge an improperly high amount. Croson's experience only establishes that the City considers it immaterial that an MBE provides a somewhat higher price than non-MBEs. It does not establish that the City improperly ignores claims that an MBE is taking advantage of the Plan to charge excessive prices.

Plaintiffs' third objection to the Plan's waiver mechanism is that it does not expressly provide for waiver where a minority contractor fails to give notice of his desire to participate. Plaintiffs complain that this can lead to hardship on non-MBEs who are low bidders, because they may be required to rework their bids after the bids have been opened in order to accommodate MBEs who express their desire to participate in an untimely fashion. Plaintiffs contend that Croson's experience demonstrates how this alleged defect may result in undue hardship on non-MBE contractors who submit low bids.

The Court rejects this criticism of the Plan's waiver mechanism. Certainly there is no need for a minority set-aside program to <u>expressly</u> provide for waiver of MBE participation where MBEs do not express their interest in participating

in a contract until after bids are opened. Plaintiffs provide no authority for this proposition.

Further, as the City points out, the Plan places the burden on non-minority contractors to seek out qualified MBEs to participate as subcontractors. There is nothing improper or unfair about such an allocation of the burden. Non-MBEs are required to bear burdens at least as great as these in the minority set-aside program upheld in Fullilove. See Fullilove, 448 U.S. at 492-93 (Appendix to Chief Justice Burger's opinion) (duty to seek out all available bona fide MBEs and make every effort to use as many of them as possible on the project; duty to use MBEs with less experience than available non-minority enterprises; duty to provide technical assistance to MBEs as needed). It would, of course, be somewhat unfair to require the lowest

bidding contractor that had made every feasible effort to solicit MBE participation to re-work its bid after the bids had been opened, on account of an MBE coming forward only then to indicate its interest.[14] However, Croson's bidding experience does not establish that the City has administered the Plan in this manner. As discussed in more detail supra, a local MBE claimed that Croson had not contacted him until the very day that bids were due. At that time the MBE undisputedly indicated his desire to participate, and continued to do so through the time that Croson requested a waiver. The City's denial of Croson's request for waiver in such circumstances does not establish how the City would respond to a request for waiver where a non-MBE contractor is unable to find any MBEs to participate after undisputedly making every feasible

effort to do so, and an MBE comes forward only after the bids have been opened.

Plaintiffs' final objection to the Plan's waiver mechanism is that there is no adequate appeals procedure when a request for waiver had been denied. The court rejects this objection for the following reasons. First, plaintiffs cite no authority for their contention that an appeals procedure is a sine qua non for a valid waiver mechanism in a minority set-aside program. The point of the waiver mechanism for equal protection purposes is to ensure that the minority set-aside program be sufficiently flexible that it is not applied unfairly whose its remedial goals cannot be met. To be sure, an appeals procedure for decisions about waivers may provide some additional assurance that the waiver decision is correctly made. But plaintiffs have not shown, and this Court

is not persuaded, that the availability of an appeals procedure for waiver determinations is essential for equal protection purposes.

But assuming that the availability of an appeal procedure is constitutionally significant, plaintiffs have not shown that the City's procedure is inadequate. The City has a procedure by which a disappointed bidder may protest an award or a decision to award a contract. See Richmond, Va. City Code Ch. 24.1, Art. VII(C). There is no reason why a disappointed low bidder whose request for waiver is denied cannot protest this denial under Article VII(C), once the City decides to award the contract to some other bidder. It may be that such a protest is not available where the City decides to re-bid a contract instead of award it to another bidder.[15] But even if a protest does not

lie where the City decides to re-bid the contract, it should not amount to a constitutional defect--at least where there is no showing that the City is using its authority to re-bid contracts so as to convert the 30% MBE participation goal into an inflexible requirement.[16]

c. Consideration of Alternative Remedies.

Plaintiffs also argue that the Plan is unconstitutional because the Council did not consider the efficacy of alternative remedies. The Court does not find any deficiency in this respect, however. Despite federal, state, and local assistance of various kinds to minority businesses, minority businesses participated in miniscule proportions as prime contractors in the City's construction contracts from 1978 to 1983. Some of those methods of assistance were

explicitly referred to at the hearing. See Transcript of Hearing at 10 (remarks of Mr. Deese). The council members were no doubt also aware of other governmental efforts at various levels to promote minority business development. The plan was both criticized as too drastic, see id. at 48 (remarks of Mr. Kemp), and praised as essential if reasonable levels of minority participation in the City's construction contracts were to be a reality in the near future. See id. at 49 (remarks of Mr. Richardson). All this indicates that the City Council considered the efficacy of alternative responses to promoting greater minority business participation in the City's construction contracting--and rejected them. While plaintiffs assert that the City's consideration of alternatives was inadequate, the only authority they assert for their position is a remark by

Justice Powell in Fullilove that merely identifies the "efficacy of alternative remedies" as a factor to be considered in reviewing race-conscious remedial programs. See Fullilove at 510. As the City notes, no court has yet struck down a minority set-aside program on the ground asserted.

d. Duration of the Remedy.

Justice Powell identified the duration of the minority set-aside program as another factor to be considered in evaluating its validity. Fullilove, supra, 448 U.S. at 510. The City's Plan is scheduled to expire on June 30, 1988--just over five years after its initial adoption. Plaintiffs do not assert that the Plan's duration is unreasonable, and the Court does not find it so.

e. Effects on Innocent Third Parties.

Justice Powell also emphasized in Fullilove that a minority set-aside program should not be approved without considering its effects on innocent third parties. Plaintiffs argue that the effects of the Plan on innocent third parties render it invalid. This factor identified by Justice Powell has not been established as an essential part of the judicial review, for equal protection purposes, of a minority set-aside program. But even if it were, the City's Plan does not appear to be invalid on account of it. The burdens that the Plan may impose on innocent third parties are primarily the following: the burden on non-MBE prime contractors of seeking out MBEs to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's

construction subcontracting business but for the City's Plan.

Both burdens would seem acceptable, even in Justice Powell's view. The City's construction projects are only some fraction of the overall construction market in the Richmond area, so that non-MBE contractors would hardly be overwhelmed by having to seek out MBE subcontractors in order to compete for City construction contracts. Similarly, non-MBE subcontractors would only be precluded from thirty percent of a fraction of the overall construction market in the area, assuming that the 30% MBE subcontracting goal is met in every contract. Plaintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitutional matter. Indeed, they concede that no court yet has struck down a minority set-aside

program on the ground that it imposes an impermissible burden on innocent third parties.

f. Overinclusiveness.

i. Geographic Limitations.

Plaintiffs' final set of objections to the constitutionality of the Plan focus on three types of overinclusiveness. First, plaintiffs point out that the Plan does not impose any limitation as to where an MBE must be located in order to participate in the Plan. They argue that this renders the Plan impermissibly overinclusive because it allows MBEs outside the Richmond area to become beneficiaries of the Plan. In support of this point, plaintiffs note that several other minority set-aside programs challenged in the courts have included geographic limitations. See, e.g., Arrington v. Associated General Contractors, supra, 403 So. 2d at 897.

But they do not cite, nor has the Court found, any case holding a minority set-aside program to be impermissibly overinclusive because of the lack of any explicit geographic limitations; nor does this Court find the lack of geographical limitations in the instant case permissible.

The Court notes that plaintiffs have not shown that contractors have in fact been required to subcontract to distant MBEs in order to satisfy the requirements of the Plan. Further, as the City points out, if the Plan had limited participants based on explicit geographic boundaries, it may have been subject to challenge under the Privileges and Immunities Clause. See United Building and Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of Camden, ____ U.S. ____, 52 U.S.L.W. 4187 (Feb. 21, 1984). Finally,

even assuming that MBEs outside the ordinary Richmond construction contracting area occasionally participate as MBEs under the Plan, no impermissible overinclusiveness would result. A minority set-aside program need not employ means that absolutely guarantee that only those MBEs intended to participate will in fact participate. Rather, there must be a "reasonable assurance" that the application of the MBE program will be limited to accomplishing its remedial objectives. Fullilove, supra, 448 at 489. The Plan does not need an express geographic limitation to provide such reasonable assurance. Indeed, an arbitrary geographic limitation could actually prevent a minority set-aside program from fulfilling its remedial purposes by excluding minority businesses that happen to fall outside the arbitrary geographic

boundaries, but that nevertheless were discriminated against in the contracting out of City construction projects.

ii. MBEs Not Actually Disadvantaged.

Plaintiffs also complain that the Plan is overinclusive because it may allow MBEs that are not economically or socially disadvantaged to participate in its benefits. They argue that the Plan must have a complaint procedure to prevent unjust participation by minority firms whose access to public contracting has not been impaired by illegal discrimination. The City does not deny that the Plan has no procedure for inquiring into the present effects of past discrimination on particular MBEs.

The Court rejects this challenge, however. It is true that the Chief Justice noted in Fullilove that the minority set-aside program upheld in that

case included a "complaint procedure...to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination" Fullilove, supra, 448 U.S. at 482.[17] But the Chief Justice did not purport to find that such a complaint procedure is essential in order to avoid impermissible overinclusiveness. Indeed, part of the Chief Justice's opinion expressly addresses the objection of overinclusiveness arising from the possibility that specific MBEs may receive benefits that cannot be justified "as a remedy for the present effects of identified prior discrimination." Id. at 486. In addressing this objection, the Chief Justice did not find it necessary that there be a way to exclude the specific MBEs that are not suffering

present effects of past discrimination. Id. at 486-89. Instead, he noted that "spurious minority-front entities can be exposed." Id. at 488. Thus, preventing participation by sham MBEs, rather than rooting out individual MBEs that do not manifest present effects of past discrimination, appears to be the relevant consideration in the Chief Justice's view.

One of the guiding principles that the Chief Justice sets out in Fullilove is that "a program that employes racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Fullilove, supra, 448 U.S. at 480. Plaintiffs in effect argue that equal protection requires any minority set-aside program to provide for individualized inquiry to ensure that

only MBEs actually suffering present effects of past discrimination are benefited through the program. This is more than narrow-tailoring, however; it is a strait-jacket. Plaintiffs have not persuaded the Court that Fullilove and the Equal Protection Clause require a remedial program to meet this standard.

The Court also notes that the Court of Appeals for the Sixth Circuit expressly rejected an identical overinclusiveness challenge to the State of Ohio's minority set-aside program. That court squarely held:

> The fact that individual minority enterprises may not be able to establish that they have suffered economically from past practices of discrimination is of no importance.

Ohio Contractors Ass'n v. Keip, supra, 713 F.2d at 174. Without making reference to Fullilove, the Court of Appeals cited the opinion of Justices Brennan, White, Marshall, and Blackmun in

Bakke for the proposition that "it is enough that each recipient [of preferential treatment] is within a general class of persons likely to have been the victims of discrimination." Bakke, supra, 438 U.S. at 363.

As discussed supra, the Chief Justice does suggest in Fullilove that, in his view, a minority set-aside program must include reasonable assurances that sham MBEs will not participate. Fullilove, supra, 448 U.S. at 488. The Plan provides such assurance. It requires the HRC to verify that any MBE submitted to meet Plan requirements is a "minority-owned and controlled business." Procedure ¶9 (emphasis original). A decision either verifying or disapproving the MBE status of a firm is ultimately subject to further review, once the City awards the contract or announces a decision to award the contract. At that

point, a disappointed bidder can protest the disapproval of its own MBE or the verification of another MBE, through the protest procedures available under the City's general procurement ordinance. See Richmond, Va. Code Ch. 24.1, Art. VII(C). There are, then, ample assurances that sham MBEs will be properly excluded. Thus, the Plan satisfies any valid overinclusiveness concerns about unjust participation by MBEs.

iii. Minority Groups Not Disadvantaged in Richmond.

Finally, plaintiffs complain that the Plan is overinclusive because it may benefit members of minority groups who have not been victims of discrimination in the construction industry in the Richmond area, such as Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.[18] Plaintiffs assert that the only evidence

presented before City Council concerned blacks.

The Court of Appeals for the Sixth Circuit rejected an almost identical challenge in Ohio Contractors, supra, 713 F.2d at 174. This Court likewise rejects plaintiffs' challenge here. First, the Court notes that the evidence before the City Council reflected limited participation (0.67%) by "minority" contractors in City construction contracts, and compared that participation with the City's "minority" population (50%). While the Court takes judicial notice that blacks are by far the largest racial/ethnic minority in the City, and were thus unquestionably severely underrepresented in City contracting, the participation of minorities besides blacks may have been similarly limited in relation to their proportion of the City's population.[19]

Further, when Congress passed the minority set-aside program upheld in Fullilove, it had concluded that participation in the construction industry by members of all these minority groups has remained limited, due to the continuing effects of past discrimination. See Fullilove, supra, 448 U.S. at 487, n. 73.

The Court sees nothing overinclusive, from a remedial standpoint, about allowing members of such groups who may now be in the Richmond area to participate in the Plan, even though the past discrimination limiting their participation in the construction industry may have occurred elsewhere. Indeed, the past discrimination that affected many of the black MBEs in the Richmond area may have occurred in Atlanta or New York rather than in the Richmond area, but plaintiffs

do not suggest that such MBEs should therefore be excluded.

D. Refusal to Grant Croson's Request for Waiver and Request for Appeal.

Croson has alleged that the City's refusal to grant Croson's request for waiver and denial of Croson's request to appeal was arbitrary and capricious, and denied Croson due process of law under both the Fourteenth Amendment of the United States Constitution and Article One, Section Eleven of the Virginia Constitution. Croson has not referred to the state constitutional due process claim in any of its materials filed after the complaint, however; the Court shall treat that basis of the claim as abandoned.

As for the federal procedural due process claim, the requirements of procedural due process apply only to the

deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). Croson has not even attempted to articulate the nature of any protected property interest it may have. The Court notes, however, that Croson was never awarded the contract at issue, and that the City in its procurement ordinance reserves the right to reject any or all bids or proposals in whole or in part if it is in the City's best interest to do so. See Richmond, Va. Code Ch. 24.1, Art. III (10)(c). Consequently, whatever property interest Croson may have would appear to be quite narrow.

A recent case provides some guidance on the possible property interests arising out of municipal bidding procedures. In Three Rivers Cablevision

v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980), a bidder on a municipal contract made procedural due process claims. The court noted the City's authority to reject all bids, id. at 1130, but proceeded to find a narrow property interest: the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the City decided to make an award. Id. at 1131. The process due such an interest, that court found, was the nonarbitrary exercise by the city of its discretion to make the award. Id.

As a threshhold matter for such an interest to exist, the party claiming deprivation of due process must be the lowest responsible bidder and in full compliance with the contract specifications. See Three Rivers Cablevision, supra, 502 F. Supp. at 1131.

One of those specifications in the City's Plan is, of course, that a contractor on a city construction project must subcontract 30% of the work to an MBE subcontractor, unless it establishes that MBEs are unwilling or unavailable to perform the work. The city reasonably determined that an MBE was available to fulfill the 30% requirement in the jail plumbing fixtures project on which Croson had bid. Indeed, the City twice determined that this was the case. Before making its first determination, the City had received work from Brown stating that his firm, Continental, was an MBE available to supply plumbing fixtures for the project on which Croson had sought waiver. The City's contract officer verified that Continental was on a state listing of MBEs that perform such work. Croson's request for waiver merely stated that Continental was

"unqualified." There was nothing unreasonable about the City's denying Croson's first request for waiver, on November 2, 1983, under these circumstances. Croson renewed its request for waiver after being informed of the City's denial. In support of its renewed request, Croson argued in a letter that Continental could not in fact supply the necessary materials because it had not established the requisite business relationships with the materials manufacturers; it also claimed that Continental had untimely provided a quote, and that the quote was higher than other quotes Croson had received. Continental represented that it could indeed supply the materials and that it did have the requisite business relationship with the manufacturer to do so. Continental also claimed that Croson had not contacted Continental until the

day the bids were due. At the City's request, Croson later submitted information about the extent to which using Continental on the project would increase the project costs. Faced with this information, the City decided on November 18, 1983 to deny Croson's renewed request for waiver because an MBE was available, and to re-bid the project, inviting Croson to submit a new bid. This decision, like the City's first decision to deny Croson's request for waiver, was not unreasonable.[20]

Almost three weeks later, Croson's counsel by letter sought to exercise Croson's "right of review" of the City's denial of its request for waiver, although it did not specify the legal authority for its right of review. The city refused; it had elected to re-bid the project, and informed Croson that there is no right to an appeal of such

decisions. Plaintiffs have not shown that any appeal of the City's decisions to re-bid projects is available.[21] Thus, the City's refusal to give Croson any further consideration of the issue of waiver, after deciding to re-bid the project, was in accordance with its rules. In sum, there was nothing arbitrary or capricious about the City's repeated denials of Croson's request for waiver or about the City's refusal to hear Croson's appeal of that denial. Further, because Croson has failed to establish that it was in full compliance with all the requirements of the contract, it had no protected property interest entitled to procedural due process.

E. Denial of MBE Status to Mega's Subcontractor Taylan.

Mega complains that the City improperly denied MBE status to Taylan,

one of the MBEs submitted in connection with its bid. Mega contends that the City improperly inquired into whether Taylan, the MBE at issue, was 51% minority controlled. Mega apparently believes that this test is improper because it does not mirror the language of the Plan itself. In order for a stock corporation to qualify as an MBE, the Plan requires that "at least fifty-one percent of the stock" be owned and controlled by minority group members. Richmond, Va. Code Ch. 24.1, Art. I (Part B)(27.10). Mega points out that Taylor, a black man, owned 51% of Taylan's stock. Apparently Mega believes that it is inappropriate for the City to inquire into whether a stock corporation's business is minority controlled; the only relevant inquiry in Mega's view is whether 51% of the corporation's stock is minority controlled.

There is no dispute that the City focused on whether Taylan as a business is "minority owned and controlled," rather than whether Taylan's stock is "owned and controlled" by a minority. Indeed, the DGS regulations implementing the Plan call for this inquiry. See Procedure ¶9. The Plan authorizes the Director of DGS to promulgate rules and regulations to implement DGS regulation requiring an inquiry into the minority control of the business itself, rather than the stock of the business, is not unauthorized by or inconsistent with the Plan. The Plan evinces the City's concern that MBEs participating in the Plan be majority-controlled as well as majority-owned. The City amended the Plan precisely for this purpose several months after enacting it, adding to the Plan's definition of "minority business enterprise" the requirement of minority

control. See Richmond, Va., Ordinance to Modify the Definition of "Minority Business Enterprise, etc., 83-127-116, § 1 at 6 (June 20, 1983). It is true, of course, that the ordinance states that a stock corporation qualifies as an MBE where 51% of the stock is owned and controlled by minority group members. But the City Council's obvious purpose behind adding the "control" requirement was to ensure that any business participating in the Plan as an MBE would not be a sham, nominally owned by minority group members but in fact controlled by non-minorities. The fact that the Plan specifies that stock corporations must have 51% of their stock owned and controlled by minority group members was surely not designed as a way to allow businesses that are not actually controlled by minorities to participate in the Plan. Rather, it reflects the

assumption that if 51% of the stock of a business is owned and controlled by minorities, then a majority of the business itself is controlled by minorities. Thus, it is not inconsistent with the Plan for City authorities, in administering it, to make their determination about a firm's MBE status based on an inquiry into minority control of the business as well as minority control of the business's stock, even where the business is a stock corporation.

The City reasonably concluded that Taylan was not 51% controlled by minority group members. When the City made its decision, it knew that Taylan was a new company. It had reliable evidence that--of all of Taylan's management functions--minority control was only exercised in the areas of personnel selection and job supervision. Taylor

himself had no business experience with respect to purchasing, bid preparation, sales, and all financial matters; he was responsible in name only for these areas. In addition, although Taylor was the majority owner of Taylan, his stock was financed entirely by a loan from Mega--his employer. The City did not err in concluding that Taylan, as a business, was not 51% controlled by minority group members.

Indeed, the evidence is such that the City reasonably could have concluded that 51% of the stock, as well as 51% of the business entity itself, was not controlled by a minority. Although Taylor nominally owned 51% of Taylan's stock, the purchase was totally financed at Mega's suggestion by a loan from Mega. For the loan, Taylor gave to Mega a note that was payable on demand and was secured by the stock certificate. While

the agreement pledging the stock certificate as security did state that Taylor retained all rights of ownership, Mega possessed the power effectively to force Taylor to surrender his ownership if he did not comply with Mega's wishes. Not only was the note payable on demand, but Taylor was an employee of Mega's. Had he sought to pay off the loan in order to exercise independent control of his Taylan stock, Mega had the power to terminate Taylor as a Mega employee.

Finally, the Court notes that whatever "rights of ownership" Taylor retained under the pledge agreement are minimal. Taylor theoretically could have sold his Taylan stock, but there would be little if any market for the stock of a new, close corporation, especially where the stock secured a loan. Taylor also was theoretically entitled to share in Taylan's profits according to his

ownership. But Taylan was not earning any overall profit in which Taylor could be expected to participate. Finally, Taylor theoretically could vote his stock (or wield his voting power) to affect Taylan's management policies. But every indication is that Taylor had no role whatsoever in Taylan's long-term management decisions, and only a minor role in Taylan's day-to-day management.

Thus, the City's decision that Taylan is not an MBE (and, therefore, that Mega had not satisfied the Plan requirements) is reasonable, whether the standard for determining a stock corporation's MBE status is minority ownership and control of 51% of the business, or minority ownership and control of 51% of the stock.

F. Federal Statutory Claims.

All the parties agree that plaintiffs' federal statutory claims--42

U.S.C. §§ 1981, 1983, and Title VI, 42 U.S.C. § 2000d--cannot be the basis of a violation unless plaintiffs also establish a violation of the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to the Title VI claims. See Fullilove, supra, 448 U.S. at 517 n.1 (opinion of Brennan, J.). It is also true of plaintiffs' claims under Sections 1981 and 1983, which are predicated on the assumption that the City has denied to plaintiffs their federal constitutional rights. Because the Court has found no constitutional violations, these claims also are denied.

IV. Conclusion

For the reasons discussed above, the Court concludes that all of plaintiffs' challenges to the Plan must fail. The City has moved for an award of its attorneys' fees in both cases under 42

U.S.C. § 1988. These motions will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date December 3, 1984

FOOTNOTES

[1]The Plan as it now stands was actually passed pursuant to two ordinances. The first ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. See Richmond, Va., Ordinance No. 83-69-59 (April 11, 1983). It was in the nature of an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been adopted five months earlier. See Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982). The Plan was amended several months after its adoption, changing the definition of minority business enterprise to require control as well as ownership by minority group members. Ordinance No. 83-127-116, § 1 at 6 (June 20, 1983).

[2]This requirement is also satisfied when the contractor itself is an MBE. Richmond, Va. Code Ch. 24.1, Art. VIII-A(A).

[3]The rules promulgated by the Director of DGS governing waivers are embodied in two documents. The first is titled "Purchasing Procedure No. 61" ("Procedure") (attached as Appendix A). The second is titled "Contract Clauses, Minority Business Utilization Plan, Thirty Percent (30%) Award Requirement for Construction") ("Contract Clauses") (attached as Appendix B). As established in these two documents, the waiver process involves DGS and the City's Human Relations Commission (HRC).

Prospective bidders on projects covered by the Plan are notified of the Plan and its waiver provisions at the outset of the bidding on a particular project. They receive in their bid package a copy of Contract Clauses, which informs them that the contract being bid is covered by the Plan, and also explains the Plan and the provisions for waiver. See Procedure ¶2. Prospective bidders also receive in their bid package a "Minority Business Utilization Committment Form" ("Commitment Form"), on which to indicate how they intend to meet their 30% MBE requirement. Contract Clauses list names and telephone numbers of agencies that are available to provide a prospective bidder with assistance in locating an MBE. See Contract Clauses ¶C.

After the close of bidding, DGS opens the bids and determines the apparent low responsive bidder. If that bidder requests a waiver, DGS forwards the request to HRC. Procedure ¶¶5-7. HRC reviews any request for waiver and returns it to DGS with a written explanation for its action. Procedure ¶¶10-12. DGS must then "approve or disapprove waiver, if required." Procedure ¶14.

[4]The protest must be submitted no later than ten days from the date of the award or announcement of the decision to award, whichever comes earlier. Richmond, Va. Code Ch. 24.1, Art. VII(C)(1).

[5]In any case, whatever telephone contacts did occur on September 30 were

brief--from one minute (2 calls) to four minutes (one call), according to telephone billing records. Bonn was not especially helpful to the MBEs he contacted: at least one requested bid specifications, which Bonn declined to provide, although Bonn did inform him about how those specifications could be obtained. Bonn asserts that it is industry custom for the subcontractor to obtain the bid specifications, although the bid clerk of one of the MBEs that Bonn contacted gave contrary testimony in a deposition.

[6] The two provisions are Va. Code § 11-37(5)(Supp. 1984) (requiring public contracts to be awarded to the lowest responsive and responsible bidder), and Va. Code § 11-44 (Supp. 1984) (prohibiting racial discrimination in public contracting).

[7] The exemption reads, in pertinent part:

> ...the provisions of this Act also shall not apply, ... to any county, city, or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles...

Va. Code § 11.35(D)(Supp. 1984).

The statute also requires that any alternative policies and procedures be "generally applicable to procurement of goods and services by such governing body and the agencies thereof," see id. Further, the statute provides that certain provisions of the Procurement

Act--those specified in Section 11-35(E)--cannot be avoided by a local government through the adoption of an alternative procurement plan. See id. Plaintiffs do not contend that the City's procurement plan is not "generally applicable" or avoids any unavoidable provisions of the Act specified in Va. Code § 11.35(E).

[8] Plaintiffs do not argue that the Plan is forbidden by this section. Although plaintiffs did make such an allegation in their complaints, they have since withdrawn that contention, because they recognize that even if it were construed as they would have it, Section 11-44 is not applicable to local governments that have chosen to adopt their own procurement procedures. See Va. Code § 11.35(D), (E).

[9] As with Section 11-44, Section 11-48 does not apply to a public body that chooses to adopt its own procurement procedures. See Va. Code § 11.35(D), (E).

[10] The United States Supreme Court upheld a federal minority set-aside program in Fullilove v. Klutznick, 448 U.S. 448 (1980). Virginia did not pass the Act until 1982. See 1982 Va. Acts Ch. 647.

[11] Those five factors are: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the extent of minority business involvement required by the remedial program and the percentage

of minority group members in the relevant population or work force; (iv) the availability of waiver provisions; and (v) the effect of the set-aside upon innocent third parties. Fullilove supra, 448 U.S. at 510-14 (Powell, J., concurring).

[12] See, e.g., South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), appeal pending; Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983); Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981, vacated, 457 U.S. 594 (1982) (vacated for failure to reach merits of state statutory issue before deciding federal constitutional claim); Southwest Washington Chapter, Nat'l Electrical Contractors Ass'n. v. Pierce County, 667 P.2d 1092 (Wash. 1983); Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981), cert. denied., 455 U.S. 913 (1982).

[13] See supra note 11.

[14] The court does not hold, however, that such a procedure would render a minority set-aside program unconstitutional. Non-MBEs were required to bear substantial burdens in terms of seeking out and assisting MBEs in the minority set-aside program upheld in Fullilove. See 448 U.S. at 492-93.

[15] When Croson sought to appeal the denial of waiver, the City represented in a

letter that it was a moot issue because the City had decided to re-bid the contract and that the City's decision to re-bid cannot be appealed. In this litigation, however, the City has also represented that Croson's request for appeal the denial of waiver was too late.

[16]The City's decision to re-bid the jailhouse fixtures contract on which Croson had bid does not establish that the City has used its authority to re-bid so as to convert the 30% goal into a rigid requirement. When it decided to re-bid the project, the City had reasonably determined that Croson's request for waiver should be denied, as discussed infra. Given the controversy between the MBE and Croson, the fact that Croson was the only contractor to bid on the contract, and the fact that Croson's request for waiver was reasonably denied, the City's decision to re-bid the contract was a reasonable response to the situation. The City invited Croson to rebid.

[17]It is noteworthy that the administrative guidelines to which Chief Justice Burger referred in this remark, while they do provide a mechanism for complaints about "unjust participation," do not define unjust participation in terms of participation by MBEs whose access to public contracting has not been impaired by the effects of prior discrimination. See id. at 495 (Appendix to Chief Justice Burger's opinion).

[18]There is no evidence that MBEs composed of members of these minority

groups actually have participated in the Plan.

[19] None of the parties has adduced evidence on the proportion of each specific minority group in Richmond's general population or the extent of each group's participation in the City's construction contracts.

[20] Croson has not persuaded the Court with any of the additional evidence it has adduced--after full discovery--that Continental was in fact unavailable, or was taking advantage of the Plan to charge excessive prices. Thus the City's decision was not only reasonable, but appears to have been absolutely correct.

[21] The City has indicated that appeals of denials of requests for waiver are governed by the procedures applicable to a protest of award or decision to award, which must be filed within ten (10) days of the award or the announcement of decision to award. See Richmond, Va. Code Ch. 24.1, Art. VII(C). Assuming this is the appropriate mechanism for appealing a denial of a request for waiver, Croson clearly was untimely.

Article VII(A) of the City Code provides 30 days for appealing where any bidder, offeror, or contractor is "refused permission to, or disqualified from, participating in public contracts." Richmond, Va. Code Ch. 24.1, Art. VII(A). Croson has suggested in its briefs that this is the applicable appeal provision where the City denies a request for

waiver, and that its appeal was therefore not untimely. Even if Croson is correct on this point, the fact remains that the City had elected to rebid the contract, mooting Croson's appeal.

AN ORDINANCE No. 83.69-59

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982) of the Richmond City Code of 1975, as amended; to add definitions of "Minority Business Contractor" and "Minority Group Members", and to add in said chapter a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan."

Patron - Mr. Richardson and Mr. Marsh

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

2. Brand name specification. A specification limited to one or more items by manufacturers' names or catalog numbers.

3. Brand name or equal specification. A specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of quality, performance, and other salient characteristics needed to meet City requirements and which provides for the submission of equivalent products.

4. Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

5. Change order (unilateral). A written order signed and unilaterally issued by the Director of General Services directing the contractor to make changes which the "changes" clauses of the contract authorize the Director of General Services to order without the consent of the contractor.

6. City Manager of the City of Richmond, Virginia.

7. City. The City of Richmond, a municipal corporation chartered by the General Assembly, Commonwealth of Virginia.

8. City Council. The City Council of the City of Richmond, Virginia.

9. The Director. The Director of General Services of the City of Richmond.

10. Confidential information. Any information which is available to an employee only because of the employee's status as an employee of this City and is not a matter of public knowledge or available to the public on request.

11. Construction. Building, altering, repairing, improving or demolishing any structure, building or road or street highway, and any draining, dredging, excavation, grading or similar work upon real property.

12. Construction management contract. A contract in which a party is retained by the City to coordinate and administer contracts for construction services for the benefit of the City, and may also include, if provided in the contract, the furnishing of construction services to the City.

13. Contract. All types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

14. Contract modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provision of any contract accomplished by mutual action of the parties of the contract.

15. Contractor. Any person, company, corporation, or partnership having a contract with the City or a using agency thereof.

16. Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

17. Cost data. Factual information concerning the cost of labor, material,

overhead, and other cost elements, which are expected to be incurred, or which have been actually incurred by the contractor in performing the contract.

18. Cost-reimbursement contract. A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this ordinance, and a fee or profit, if any.

19. Direct or indirect participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

20. Disadvantaged business. A small business which is owned or controlled by a majority of persons, not

limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages.

21. Emergency Purchases. The director may authorize or order the expenditure of funds for the emergency purchases of supplies, materials, equipment and contractual services for the using agencies without recourse to competitive bidding whenever due to circumstances, accidents or failure of mechanical equipment, the purchase of supplies, materials, equipment, and contractual services are essential to protect and preserve the interests of the city and its inhabitants, the proper functioning of the city government and the efficient rendering of public services.

22. Employee. An individual drawing a salary or wages from the City whether elected or not; any non-compensated individual performing personal services for the City or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of this City and non-compensated individual serving as an elected official of the City.

23. Goods. All material, equipment, supplies, printing and automated data processing hardware and software.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned by minority group members.

27.20. Minority Group Members. Citizens of the United States who are

Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union, committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and

empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in

all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small Business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Chapter 24.1 of the Richmond City Code of 1975, as amended, be amended by adding therein a new article numbered Article VIII-A, entitled: "Minority Business Utilization Plan," as follows:

ARTICLE VIII-A

Minority Business Utilization Plan

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

B. Rules and Regulations

The Director of the Department of General Services shall be authorized to promulgate rules and regulations to implement the above requirements, which rules and regulations shall allow waivers in those individual situations where a contractor can prove to the satisfaction of the director that the requirements herein cannot be achieved.

C. Article Remedial; Effective through June 30, 1988

This article is remedial and is enacted for the purpose or promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors.

This article shall be in force and effect thirty days from adoption, but shall expire and terminate as of the last moment of June 30, 1988.

AN ORDINANCE No. 83-127-116

To amend Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, Procurement (Ordinance No. 82-294-270, adopted December 20, 1982), as amended (Ordinance No. 83-69-59, adopted April 11, 1983) of the Richmond City Code of 1975, as amended, to modify the definition of "Minority Business Enterprise" and to amend and reordain Article VIII-A, "Minority Business Utilization Plan", Part A to include within covered contracts the following "purchase of supplies, materials and equipment, contractual services, contracts of insurance and security bonds."

Patron - Mayor West

Approved as to form and legality
by City Attorney

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That Article I, General Provisions, F. Part B, definitions, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

Article I

F. Part B -- Definitions

1. Blind trusts. An independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

24. Governing body. The City Council of Richmond, Virginia.

25. Informality. A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or quality, quantity, or delivery

schedule for the goods, services or construction being procured.

26. Insurance. A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

27. Invitation for bids. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any Invitation for Bids.

27.10. Minority Business Enterprise. A business at least fifty-one per cent of which is owned and controlled or fifty-one per cent minority-owned and operated by minority group members or, in case of a stock corporation, at least fifty-one per cent of the stock which is owned and controlled by minority group members.

27.20. Minority Group Members. Citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

28. Nominal value. So small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than $25.00.

29. Non-professional services. Any services not specifically identified as professional services in the following definition.

30. Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

31. Person. Any business, individual, corporation, union,

committee, club, other organization, or group of individuals.

32. Price analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

33. Pricing data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offer or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

34. Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created

by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this ordinance.

35. Qualified products list. An approved list of goods, services, or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

36. Request for proposals. (RFP) All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

37. Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

38. Responsive bidder. A person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

39. Services. Any work performed by an independent contractor which does not consist primarily of acquisition of euqipment or materials, or the rental of equipment, materials, and supplies.

40. Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

41. Small business. A United States business which is independently owned and which is not dominant in its field of operation or an affilate or

subsidiary of a business dominant in its field of operation.

42. Specification. Any written description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

43. Using agency. Any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this ordinance.

§ 2. That Article VIII-A, Minority Business Utilization Plan, section A, Covered Contracts, of Chapter 24.1, of the Richmond City Code of 1975, as amended, be and is hereby amended and reordained as follows:

ARTICLE VIII-A

A. Covered Contracts

All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

The City of Richmond in awarding contracts to its contractors, including suppliers, for the sale and furnishing of supplies, materials and equipment, for providing contractual services, and for writing and furnishing policies of insurance and surety bonds in which the City of Richmond is the principal insured or party for whom such bond is written and for which policy of insurance or bond the premium charged is billed to the City of Richmond, shall strive to obtain a

minimum of twenty per cent of same from minority business enterprises in the annual aggregate expenditure for such contracts and services.